MAR 5 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1339

ROBERT BOYD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, ALLEN COUNTY

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IN THE

Supreme Court of the United States

No.

ROBERT BOYD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, Robert Boyd, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered on December 5, 1973, which denied appeal from the Court of Appeals, Allen County, Ohio.

OPINION BELOW

The opinion of the Court of Appeals, Allen County, Ohio, Third Appellate Judicial District, is cited as *State v. Boyd*, 35 O. Ap. 2d 147, 300 N.E. 2d 752 (1973). The Ohio Supreme Court orders denying a hearing and a rehearing are set forth in Appendix D and E.

JURISDICTION

A timely petition for rehearing was denied by the Ohio Supreme Court on December 5, 1973, and this petition for certiorari was filed within ninety (90) days of that date.

Jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Is Ohio Revised Code 2905.34 and 2903.11 unconstitutional where the statutes do not specifically define or depict the proscribed sexual conduct as mandated by *Miller v. California*, 413 U.S. 13 (1973)?

2. Can a court retroactively apply the *Miller*, definition of obscenity or judicially construe the requisite specificity into the statutes at bar to uphold the conviction of the Petitioner whose conduct preceded *Miller*?

3. Can the State utilize a subpoena *duces tecum* to compel a defendant in a criminal case to produce evidence which might tend to incriminate him?

4. Can a magistrate "focus searchingly on the question of obscenity" in determining whether to issue a search warrant where his only source of information is conclusionary

hearsay statements with no showing of reliability, related to him by way of an affidavit from an affiant who has failed to observe the film?

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States and Ohio Revised Code Sections 2905.34 and 2903.11 are set forth in Appendix A.

STATEMENT OF THE CASE

On September 17, 1969, the Petitioner was arrested and later indicted for showing an allegedly obscene film trailer entitled "Starlet" in violation of Ohio Revised Code Sections 2905.34 and 2903.11. He was arrested at the Springbrook Drive-In Theatre in Lima, Ohio by members of the Sheriff's Department and Prosecutor's Office. The officers seized the film trailer depicting the coming attraction, "Starlet," pursuant to a search warrant (*See* Search Warrant, Appendix B). Neither the issuing magistrate nor the affiant viewed the film prior to its confiscation.

The Petitioner filed a timely motion to suppress which was overruled. Petitioner then filed for injunctive relief in the United States District Court in Toledo asking the court to order the Respondent to return the film due to the prior restraint resulting from the seizure. The film was ordered returned by the federal court. Respondent returned the film to the Petitioner coupled with a subpoena *duces tecum* ordering the Petitioner to bring the film with him to his trial. Petitioner filed motions to quash the subpoena *duces tecum*, to quash the indictment

and a demurrer. All motions were overruled by the trial court and affirmed by the Ohio appellate courts.

At trial, the trailer "Starlet" was admitted into evidence over Petitioner's objections. On May 20, 1971, the Petitioner was convicted of both counts of the indictment by the Allen County Court of Common Pleas and fined $2,000.00 on each count.

Notice of Appeal was filed on May 24, 1971. On July 19, 1971, the Court of Appeals dismissed the appeal for premature filing. The Supreme Court of Ohio reversed and remanded to the Allen County Court of Appeals on May 3, 1972.

The Allen County Court of Appeals on remand in an opinion rendered on December 18, 1972, affirmed the Court of Common Pleas decision.

Petitioner appealed the Allen County Court of Appeals decision to the Ohio Supreme Court. On April 6, 1973, the Supreme Court of Ohio overruled Petitioner's motion for leave to appeal.

After the decision of *Miller v. California,* 413 U.S. 13, Petitioner filed a supplemental motion requesting the Supreme Court to review the Constitutionality of the Ohio statutes involved at bar in light of *Miller.*

On December 5, 1973, the Supreme Court of Ohio denied a rehearing.

REASONS FOR GRANTING THE WRIT

The decision below raises significant Constitutional questions which have not been decided by this Court. Said

Constitutional questions have been decided inconsistently and without uniformity by various state and federal courts.

1. **OHIO REVISED CODE SECTIONS 2905.34 AND 2903.11 DO NOT MEET THE CONSTITUTIONAL MANDATES OF *MILLER v. CALIFORNIA*, 413 U.S. 13 (1973).**

On June 21, 1973, this Court handed down five companion cases dealing with obscenity. This Court reaffirmed its position that obscenity is not protected by the First Amendment, but additionally set forth a new criteria for determining whether a particular work is obscene (*See, Miller v. California*, 413 U.S. 13 (1973)). In *Miller*, this Court set forth the following renovated definition of obscenity:

> ". . . The basic guidelines for the trier of fact must be: a) whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; b) *whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law* and c) whether the work taken as a whole lacks serious literary, artistic, political or scientific value." (Emphasis added) *Id.* at 24, 25

After articulating this new criteria, this Court vacated and remanded the case for further proceedings consistent with First Amendment standards established by *Miller*. In all the companion "obscenity" cases decided that day, this Court remanded *all* of them for proceedings consistent with *Miller* (*See, Paris Adult Theatre I v. Slaton*, 413 U.S.

49 [1973]; *Kaplan v. California*, 413 U.S. 115 [1973]; *United States v. 12 200 feet reels of Film*, 413 U.S. 123 [1973]; *U.S. v. Orito*, 413 U.S. 139 [1973]).

After this Court handed down the aforementioned decisions, Petitioner filed a supplemental memorandum requesting the Ohio Supreme Court to review the Constitutionality of the Ohio statutes at bar in light of *Miller*. The Ohio Supreme Court refused.

A perusal of the Ohio statutes involved at bar shows that they do not meet the standards of *Miller*.

Ohio Revised Code Sections 2905.34 and 2903.11 in pertinent part read:

> (Ohio Revised Code Section 2905.34)
> ". . . No person shall knowingly sell, lend, give away . . . *an obscene, lewd or lascivious* book, magazine . . . motion picture film . . . or article of an *indecent or immoral* nature or a drug, medicine, article or thing intended for the prevention of conception. . ."
>
> (Ohio Revised Code Section 2903.11)
> ". . . No person shall knowingly sell, distribute, import, print or publish for the purpose of selling to a minor . . . a motion picture film or other thing which is *obscene or indecent or which manifestly tends to corrupt the morals of such youth.*"
>
> (Full text of statutes in Appendix)

These statutes (O.R.C. 2905.34 and 2903.11) fail to give adequate notice to Petitioner of what type of conduct is proscribed and do not specifically define the patently offensive conduct as required by *Miller*.

By failing to give Petitioner notice of the unsanctioned conduct, the State violated the Constitutional doctrine of definitiveness. This venerable doctrine states that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed (*See, U.S. v. Harris*, 347 U.S. 612 [1954]).

Miller, reaffirmed earlier decisions of this Court which have consistently applied the doctrine to the area of obscenity (*See, Rabe v. Washington*, 405 U.S. 313 [1972]; *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 [1968]; *Winters v. New York*, 333 U.S. 307 [1948]).

Numerous federal and state courts in cases involving statutes similar to the ones at bar, have found them to be Constitutionally deficient in light of *Miller*.

In *Hamar Theatres v. Cryan*, 13 CRL 2449 (1973), a three-judge federal panel struck down the New Jersey obscenity statute for failing to meet the *Miller* criteria. A comparison of the New Jersey obscenity statute with the statute at bar shows the New Jersey statute to be much closer to the mandates of *Miller*.

In *Stroud v. State*, ___ Ind. ___, 300 N.E. 2d 100 (1973), the Defendants were found guilty of the sale of obscene material under Indiana law. After being vacated and remanded in light of *Miller*, the Indiana Supreme Court held the statute too general in light of the new standards enunciated in *Miller* (*See, Mohney v. State*, ___ Ind. ___, 300 N.E. 2d 66 [1973]; *McCright v. Olson*, No. 4849 [U.S.D.C. North Dakota, decided Dec. 7, 1973], held N. Dakota obscenity statutes unconstitutional in light of *Miller; Louisiana v. Shreveport News Agency, Inc.*, No. 53988 [La. Supreme Court, decided Dec. 1973], held Louisiana obscenity statutes unconstitutional in light of

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Miller; Iowa v. Wedelstedt, 1-56081 [Iowa Sup. Ct., decided Dec. 19, 1973], held Iowa statutes unconstitutional in light of *Miller*).

The Ohio statutory scheme at bar fails to meet the Constitutional requirements of specificity required by *Miller.* It is Petitioner's position that the Ohio obscenity statutes involved at bar are clearly too amorphous to support a criminal conviction in light of *Miller.*

Since the conviction at bar, the Ohio legislature has *twice* made the Ohio obscenity statutes the subject of extensive revamping. This legislative action is a tacit admission by the legislature that these previous statutes did not meet basic Constitutional guarantees.

Additionally, Petitioner submits that his conviction cannot be made to conform to the *Miller* dictates by judicially construing the requisite specificity into the statutes. Such a construction would violate the *ex post facto* mandates of the Constitution.

At the time of Petitioner's alleged illegal actions, the test of obscenity was the, now out-dated, *Memoirs* test. The prosecutor's burden of proof, as Chief Justice Burger noted in *Miller, supra,* was "a burden virtually impossible to discharge under our criminal standards of proof." It is obvious that the application of the new *Miller* standard to the Petitioner, whose actions took place under the *Memoirs* standard, would be a judicial *ex post facto* application of the law. Additionally, to allow the Ohio courts to now retroactively authoritatively construe the proscribed sexual conduct into Ohio Revised Code Sections 2905.34 and 2903.11 to meet the *Miller* standards would be to deprive the Petitioner of due process by denying him adequate notice of what constituted criminal acts. The court

in *U.S. v. Lang*, No. 10712, HP-CD (W.D. Calif., decided July 8, 1973), adopted this rationale and asserted that there is an *ex post facto* violation of any application of *Miller* standards to obscenity cases where the alleged violation took place prior to the *Miller* decision (*Also see, Rhodes v. State*, 14 CRL 2081 [Fla. 1973]).

This Court in *Bouie v. Columbia*, 378 U.S. 347 (1964), recognized the invalidity of utilizing a subsequent judicial interpretation to convict a defendant for conduct which preceded the judicial construction. The Court declared:

> ". . . Indeed an unforeseeable judicial enlargement of a criminal statute, applied retroactively operates precisely like an *ex post facto* law, such that Article I, Section 10 of the Constitution forbids." *Id.* at 353.

Although Petitioner submits it would be unconstitutional for the Ohio court to authoritatively construe the statutes at bar to meet the *Miller* test, it must be noted that the Ohio Supreme Court in denying a hearing to Petitioner *has not* authoritatively construed these statutes and minimally this case must be remanded to them for an authoritative retroactive construction.

2. THE STATE CANNOT UTILIZE A SUBPOENA *DUCES TECUM* TO COMPEL A DEFENDANT IN A CRIMINAL CASE TO PRODUCE EVIDENCE WHICH MIGHT TEND TO INCRIMINATE HIM.

At bar, the Respondent forced the Petitioner, through use of a subpoena *duces tecum*, to present to the court a movie which was used as evidence to secure his conviction. This was done in contravention of the express wording of the Fifth Amendment.

The Fifth Amendment has been interpreted numerous times by this Court to mean that a Defendant in a criminal proceeding cannot be required either directly or indirectly to testify against himself nor can his books or papers be made to speak against him (*See, Boyd v. United States,* 116 U.S. 616 [1885]; *Lees v. U.S.,* 150 U.S. 476 [1893]; *Gilbert v. California,* 388 U.S. 263 [1967]; *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385 [1920]; *U.S. v. White,* 322 U.S. 694 [1944]).

In the landmark case of *Boyd, supra,* this Court held that the compulsory production of a man's papers to be used as evidence against him is equivalent to compelling him to be a witness against himself and is prohibited by the Fifth Amendment.

This Court in *Couch v. United States,* 409 U.S. 322, (1973), again upheld the sanctity of the Fifth Amendment:

> ". . . The Constitution explicitly prohibits compelling an accused to bear witness against himself. . . Compulsion upon the person asserting it is an important element of the privilege and prohibition of compelling a man to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him. It is the extortion of information from the accused himself that offends our sense of justice." *Id.* at 328.

Despite the commands of this Court (*Also see, U.S. v. Cohen,* 388 F.2d 464 [CA. 9, 1967]; *U.S. v. White,* 477 F.2d 757 [CA 5, 1973]), prosecutors throughout the country have attempted to procure obscenity convictions through the use of a subpoena *duces tecum* to produce the main evidence. The California Court of Appeals in *People v.*

DeRenzy, 79 Cal. Rptr. 777 (1969), in discussing a similar problem as the one at bar, stated:

> ". . . any court process designed to compel production of the questioned material would obviously infringe on the possessor's Fifth Amendment rights." (*See, Boyd v. U.S.*, 116 U.S. 616, 634-635). *Id.* at 779.

The Louisiana Supreme Court, citing *Boyd* and *DeRenzy*, stated:

> ". . . any court process addressed to a prospective Defendant compelling him to produce the evidence which would convict him of a crime would violate the Fifth Amendment right against self-incrimination." 264 So.2d 615, 619.

(*See also, Bryers v. State*, 480 S.W. 2d 712 [1972]; *Cummings v. State*, 480 S.W. 2d 704 [1972]).

The Pennsylvania Supreme Court in *Commonwealth v. Polak*, 438 Pa. 67, 263 A.2d 354 (1970), also disallowed the use of a subpoena ordering a defendant to bring in incriminating evidence (movies) to court.

In Ohio and Arizona, this issue has caused inconsistency and confusion between the state and federal courts. The Arizona Supreme Court in *Anderson v. Coulter*, 499 P.2d 103 (Ariz., 1972), cert. denied, 410 U.S. 990 (1973), permitted the use of a subpoena to compel the defendant to bring in incriminating evidence for use in his criminal trial. However, the U.S. District Court of Arizona in *Russell v. Blubaum*, No. CIV-73-319 PHX WEC (1973), specifically rejected *Anderson*, and held that a subpoena *duces tecum* could *not* be utilized to compel a defendant to produce motion picture film in a judicial proceeding.

In a case emanating from the same district as the case at bar, the Federal Court in *Smith v. Fair*, 363 F. Supp. 1021 (1973), held that the use of a subpoena *duces tecum* to compel a defendant to produce a motion picture film for a judicial hearing was violative of his Constitutional right against self-incrimination (*Also see, Maley v. Honorable James R. Meyers*, U.S. Dist. Ct., West Div. Texas, Waco Division, Civil Action No. W-73-CA 87 [Dec. 20, 1973], rejects *Anderson* rationale).

By this procedure, which the Arizona and Ohio Supreme Courts find permissible, the State could subpoena in, without probable cause, evidence which was suspected of being used in the commission of a crime. This procedure would provide the State with evidence of a testimonial or communicative nature to incriminate the unfortunate Defendant. The situation becomes more critical in cases where free speech material is involved as the State is actively hollowing the First and Fifth Amendments. This unconstitutional government assault against the individual by subpoenaeing incriminating evidence is unnecessary as the State can effectively gain the evidence and prosecute under the procedures enunciated in *Heller v. New York*, 413 U.S. 483 (1973), and *Roaden v. Kentucky*, 413 U.S. 496 (1973). These cases set up a workable procedure where a motion picture could be secured for use in a judicial proceeding. These procedures make no mention of a subpoena *duces tecum*. These decisions strike an artful balance between prior restraint and the right of a State to obtain evidence for use in a judicial proceeding without having to violate a Defendant's Fifth Amendment rights.

At bar, the State, through the ploy of a subpoena *duces tecum*, ordered the Petitioner to bring into court the very film which was the main evidence used to convict him. It

is hard to picture a more blatent violation of Petitioner's Fifth Amendment rights. The court has long recognized this Fifth Amendment privilege and to allow the State, through legal extortion, to force the individual either to incriminate himself or be jailed for contempt would be a "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality" (*Ullman v. U.S.*, 350 U.S. 422, 428 [1956]).

3. THE PROCEDURE UTILIZED FOR THE ISSUANCE OF THE SEARCH WARRANT DID NOT MEET THE CONSTITUTIONAL REQUIREMENTS NECESSARY FOR A FREE SPEECH SEIZURE AS ENUNCIATED IN *LEE ART THEATRE v. VIRGINIA*, 392 U.S. 636 (1968).

It is maintained that the procedure employed at bar for the issuance of a search warrant for First Amendment materials did not provide the stringent safeguards that are Constitutionally required for such seizures.

The trailer "Starlet" had been seized pursuant to a search warrant. The affiant to the search warrant *did not* personally see the film before its confiscation. The basis for the issuance of the warrant was hearsay received from two informants.

In a case in a similar vein, *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), a search warrant was issued pursuant to an affidavit of a police officer who *viewed* the movie. This Court reversed and remanded, stating:

> ". . . The procedure under which the warrant was issued was solely upon the conclusionary assertions of the police officer without any inquiry by the Justice of Peace into the

> factual basis for the officer's conclusions was not a procedure designed to focus searchingly on the question of obscenity and therefore fell short of the Constitutional requirements demanding necessary sensitivity to freedom of expression." *Id.* at 637.

At bar, the affiant did not even view the film trailer, while the officer in *Lee Art Theatre* at least viewed the film, but as was noted above, this was found Constitutionally deficient as a basis for seizure of First Amendment materials.

Additionally, the search warrant failed to meet the requirements of *Spinelli v. U.S.*, 393 U.S. 410 (1968), and *Aguilar v. Texas*, 378 U.S. 108 (1963), which require the following criteria in order for an affidavit for a search warrant based on hearsay to be valid: 1) a basis for concluding the informants were reliable; 2) a sufficient statement of the underlying circumstances from which the informants concluded (in this case) the Petitioner was showing an obscene motion picture.

In the search warrant at hand, there were two informants; the affidavit is devoid of any showing of past or present reliability. There is not even the perfunctory statement that the informants were reliable. There is no mention as to any previous reliability in determining the obscenity of movies or any underlying circumstances from which a magistrate could "focus searchingly on the question of obscenity" (*See, Marcus v. Search Warrant*, 367 U.S. 717, 732 [1961]; *U.S. v. Santiago*, 424 F.2d 1047 [1970]). This Court in *Heller v. New York*, 413 U.S. 483 (1973), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), set up preferential treatment for search warrants' seizures involving

First Amendment protections. Stricter standards are required for search warrants involving free speech materials.

The problems that can arise with the allowance of hearsay informants as a basis for free speech seizures is shown at bar, as the facts recited in the search warrant affidavit are inaccurate when applied to the film in question. Obscenity is an emotional issue where personal attitudes can easily influence an individual's perception of their observations. To base a search warrant on an hearsay informant's conclusionary statements, with no showing as to the specificity of the acts allegedly observed and then have the affiant relate their impressions by way of an affidavit to a neutral magistrate without any distortion of the facts is contrary to common sense. To expect a magistrate with only this information before him to "focus searchingly on the question of obscenity" is an unrealistic hope.

If free speech material is to have the protection guaranteed it by the Constitution, there must be a "higher hurdle of reasonableness" (*See, Roaden, supra*) reached before a search warrant is issued.

Statements by hearsay informants, without a showing of reliability, do not provide the requisite information for a magistrate to make a determination as the obscenity of the Constitutionally protected materials. This process did not leap the higher hurdle of reasonableness required for a warrant involving prior restraint of the right of expression as mandated by *Lee Art Theatre, Marcus,* and *Roaden.*

CONCLUSION

Therefore, in consideration of the foregoing, a writ of certiorari should issue to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when an actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall his private property be taken for public use, without just compensation."

(O. R. C. 2903.11)

"No person shall knowingly sell, distribute, import, print, or publish for the purpose of selling or distributing to a minor under the age of eighteen, nor shall knowingly introduce, or have intentions of introducing into a family, school, or place of education for the purpose of sale, exhibition, loan, or circulation to a minor under the age of eighteen, nor shall knowingly buy, procure, receive, or have in his possession for the purpose of sale, exhibition, loan, or circulation to a minor under the age of eighteen any book, pamphlet, ballad, printed paper, phonographic record, print, picture, figure, image, description, motion picture film, or other thing which is obscene or indecent or which manifestly tends to corrupt the morals of such youth.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars, or imprisoned not less than one nor more than seven years, or both."

(O. R. C. 2905.34)

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars, or imprisoned not less than one nor more than seven years, or both."

APPENDIX B

THE FOLLOWING BLANK HAVE BEEN APPD. BY ATTY. GEN., OHIO. C130-2

SEARCH WARRANT

Rev. Code 2933.23
Gen'l Code 13430-3

In the Lima Municipal Court, Lima, Ohio
~~Court of Common Pleas~~

No.

The State of Ohio, Allen County, ss.

To the Sheriff of Allen County, Ohio, GREETINGS:

Whereas there has been filed with me an affidavit, of which the following is a copy:

Before me, LAWRENCE S. HUFFMAN, a Notary Public in and for said County and State *personally appeared* WILLIAM H. DAILEY, JR. *who, being first duly sworn according to law, deposes and says that he has good cause to believe and does believe that the offense of*

knowingly exhibiting an obscene, lewd and lascivious motion picture film in violation of Section 2905.34 of the Revised Code of Ohio *has been committed and that the person responsible has never been placed in jeopardy therefore; that the following things and/or persons for which search authorization is sought, to-wit:*

one motion picture film trailer for a moving picture called "Starlet"

is/are concealed in the building of the Springbrook Drive-In Theater

Affiant further avers the facts upon which such belief is based are:

see attachment

The things and/or persons to be seized are: one motion picture film trailer of the moving picture entitled "Starlet" and the person of Robert Boyd, who exhibited said film on the 13th day of September, 1969.

/S/ William H. Dailey, Jr.
Affiant

Sworn to before me and subscribed in my presence this 17th *day of* September, 1969.

/S/ Lawrence S. Huffman
Notary Public, State of Ohio

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the night time into the building of the said Springbrook Drive-In Theater of the Township of Bath in the County aforesaid, and there diligently search for the said goods

and chattels, or articles, to-wit: one motion picture film trailer of the moving picture "Starlet"

and that you bring the same or any part thereof, found on such search and also the body of Robert Boyd

forthwith before me, or some other judge or magistrate of the county having cognizance thereof to be disposed of and dealt with according to law.

Given under my hand, this 17th day of September, 19 69.

Roger D. Andrews, Judge, Title
Lima Municipal Court
Lima, Ohio
Deputy Clerk

1. "daytime" or "nighttime" as the case may be.
2. If applicable, insert: "and also the body of_____."

SHERIFF'S RETURN

Sheriff's Office, *County, Ohio,* , 19

Received this writ on the *day of* , 19 , at o'clock

M., and pursuant to its command I executed the same on the *day of*

19 , *by searching the premises therein described for the persons and/or things therein set forth in the* [1]_____ *time of said day*

whereupon I did seize the following things and/or persons, to-wit:

and now have them before the Court.

SHERIFF'S FEES	
Service and Return	
Mileage_____miles at 8c	
Total	

Sheriff

By_____
Deputy Sheriff

1. "day" or "night."

No._____
Page_____
Dkt._____
Page_____
Record_____

COURT OF COMMON PLEAS
In the Lima Municipal Court, Lima, Ohio

In the Matter of the Search of
The Building of the Spring-brook Drive-In Theater
R. D. #3, Lima, Ohio

SEARCH WARRANT

Returned and Filed
, 19
Clerk
By_____ Deputy Clerk

(Sign as Copy to be Served only.)
I certify this to be a true copy of the original order and of the endorsements thereon.

Sheriff
By_____ Deputy

Affiant further avers the facts upon which such belief is based are: information from E. L. Stringfield, 3364 Allentown Road, Lima, Ohio, that he had viewed an exhibition of a motion picture film trailer on September 13, 1969 and that said film was in color and showed a nude woman with the private parts of her body exposed; that said film depicted a nude couple engaged in sexual relations and that said film showed a nude female committing an act of oral sodomy upon a nude male.

Affiant further says that the facts on which belief is based, is information received from Paul Jackson, Bath Township Constable; that he has viewed exhibitions of said motion picture film trailer of the moving picture "Starlet" on several occasions prior to September 13, 1969; that said motion picture film trailer is in color; that its exhibition lasts approximately seven (7) minutes on the screen; that it depicts a nude male and female engaged in the act of sexual intercourse; that it depicts an act of oral sodomy performed by the nude female and that the nude female appears with her pubic area and other private parts of her body fully exposed; that said motion picture film trailer is contained in a metal container designed for the purpose of storing said film and was seen by the said Paul Jackson in the projection room of the Springbrook Drive-In Theater on or about September 13, 1969.

APPENDIX C

Subpena Duces Tecum

CRIMINAL CASE.
Revised Code, Sec. 2935.05

The State of Ohio, Allen County. Common Pleas Court

To the Sheriff of said County:

You are hereby commanded to subpena Robert Boyd

to be and appear before the Common Pleas Court at the Court House in said County, on the 9th day of December A. D. 19 70 at 9:00 o'clock A. M., to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes. Robert Boyd;

and also to bring with him, and produce at the time and place aforesaid

one (1) reel approximately 630' of 35 mm color film, being a trailer for the motion picture known as "Starlet" the same now being in your possession

; and not depart the Court without leave.

And therein to fail not, under penalty of the law; and to have then and there this writ.

Said Court requires said attendance of said witnesses on behalf of the State.

WITNESS my hand and the seal of said Court, this 23rd day of October 19 70

Robert H. Dunlap
Clerk

By Virginia Belogarlovich
Deputy

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 73 TERM
To wit: April 6, 1973

State of Ohio,
Appellee,

vs.

Robert Boyd,
Appellant.

No. 73-183

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for ALLEN *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Jack Gallon

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of ____ 19____

____ *Clerk*

____ *Deputy*

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

Robert Boyd,
Appellant.

19 73 TERM

To wit: December 5, 1973

No. 73-183

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.____ Page____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 5th *day of* December, *19* 73

THOMAS L. STARTZMAN *Clerk*

By _____ *Deputy*

APPENDIX F

IN THE COURT OF APPEALS OF
THE THIRD APPELLATE JUDICIAL
DISTRICT OF OHIO,

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROBERT BOYD,
Defendant-Appellant.

MEMORANDUM OPINION

(No. 1450 – Decided: December 18, 1972.)

APPEAL: Court of Appeals for Allen County.
MR. TED IORIO, for Appellant.
MR. LAWRENCE S. HUFFMAN, Prosecuting Attorney, for Appellee.

GUERNSEY, J. This is an appeal by the defendant, Robert Boyd, from a judgment of the Common Pleas Court of Allen County, Ohio, convicting and sentencing him for a violation of R.C. 2903.11, (130 v 658) in that on September 13, 1969, he "did unlawfully and knowingly have in his possession for the purpose of exhibition to a minor under the age of eighteen years, a motion picture film which is obscene, indecent, and which manifestly tends to corrupt the morals of such youth," and for a violation of R.C. 2905.34, (131 v 673), in that on September 17, 1969, he "did unlawfully, and knowingly, have in his

possession and under his control an obscene, lewd and lascivious motion picutre film for the purpose of exhibition and dissemination of said obscene, lewd and lascivious motion picture film."

It appears undisputed in evidence, among other things, that Boyd was, on both dates, the manager of an outdoor movie theater located near Lima, Ohio; that on the earlier date he caused to be exhibited in the time interval between the showing of two feature films and together with other associated advertising material advertising coming attractions a film trailer of approximately ten minutes duration advertising the movie "Starlet"; that the trailer depicted, or graphically suggested, the happening of a variety of sexual acts occurring between both those of the opposite and of the same sex and was accompanied by a matching sound track replete with double entendre aiding in the suggestion of what one might conclude the acts depicted as portraying; that neither in the newspaper advertising of the theater, nor on the premises thereof was any mention made that anything of such nature was to be shown that evening or that the audience should be in any manner restricted; that no other forewarning was given of the showing of the trailer; that in one car and seeing the trailer shown were three boys of less than eleven, nine and seven years of age, respectively, in another car and seeing the trailer shown was a boy of eleven years of age, and in the theater were many other young children as well as adults; that on September 17, 1969, Boyd was met on the steps of the projection booth of the theater by a deputy sheriff, was handed a search warrant for the trailer, which Boyd then got from the floor of the projection booth, instructed the projectionist to remove advertising clips from it, which was then done, and the film trailer was then taken into possession of the deputy sheriff; that the film trailer was

subsequently returned to Boyd pursuant to order of a federal district court and concurrent with its return a subpoena duces tecum was served on Boyd to produce the film at the trial of the charges against him.

In his appeal, Boyd makes give assignments of error which we will consider in the chronology of the trial.

Assignment of Error No. II. "The trial court erred in permitting the introduction into evidence of the motion picture trailer "Starlet" because it was seized without a prior adversary hearing having first been held and pursuant to an invalid search warrant."

Assignment of Error No. III. "The trial court erred in overruling appeallant's motion to quash a subpoena duces tecum requiring him to bring into court the motion picture trailer "Starlet" which was then admitted into evidence."

We consider these two assignments of error together because they involve, in their essentials, much of the same matter, the argument being that the trailer was illegally seized, properly returned by the federal court, and once ordered returned could not be ordered produced pursuant to subpoena duces tecum. To dispose of these contentions we need only assume, without deciding, that the defendant is right in his contention that evidence ordered returned because illegally seized may not be ordered produced pursuant to such subpoena. However, it does not follow that evidence which has been legally seized and then returned may not be ordered produced pursuant to such subpoena.

We have examined the decisions of the United States Supreme Court carefully, with particular emphasis on its decisions in the cases of Marcus v. Search Warrant (1961),

367 U.S. 717; A Quantity of Books v. Kansas (1964), 378 U.S. 205; and Freedman v. Maryland (1965), 380 U.S. 51, and notwithstanding that these cases set forth limitations on seizure *as contraband* and for destruction we find no decision which would indicate that one copy of a film alleged to be obscene may not be seized without a prior adversary hearing to be used *as evidence* in a prosecution for its possession. The Supreme Court of Ohio has recognized this distinction in State v. Albini (1972), 31 Ohio St. 2d 27, where it held:

> "Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidence to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

We find this case decisive of the issue of prior adversary hearing, and as it is consistent with the holdings of the United States Supreme Court we are not in the position of following a decision of the Ohio Supreme Court in the face of a different decision on the same issue by the United States Supreme Court.

Defendant further contends, however, that the search warrant was insufficient because the affiant "did not see personally the trailer "Starlet" before its confiscation" and "relied on the hearsay information received from two informants." Admittedly the affiant who obtained the search warrant was not prior to executing his affidavit a

witness to the showing of the film trailer in question and his affidavit contained the following with respect to his informants:

> "Affiant further avers the facts upon which such relief [the concealment of the obscene movie trailer] is based are: information received from E.L. Stringfield, 3364 Allentown Road, Lima, Ohio, that he had viewed an exhibition of a motion picture film trailer on September 13, 1969, and that said film was in color and showed a nude woman with the private parts of her body exposed; that said film depicted a nude couple engaged in sexual relations and that said film showed a nude female committing an act of oral sodomy upon a nude male.
>
> "Affiant further says that the facts on which belief is based, is information received from Paul Jackson, Bath Township Constable; that he has viewed exhibitions of said motion picture film trailer of the moving picture 'Starlet' on several occasions prior to September 13, 1969; that said motion picture film trailer is in color; that its exhibition lasts approximately seven (7) minutes on the screen; that it depicts a nude male and female engaged in the act of sexual intercourse; that it depicts an act of oral sodomy performed by the nude female and that the nude female appears with her pubic area and other private parts of her body fully exposed; that said motion picture film trailer is contained in a metal container designed for the purpose of storing said film and was seen by the said Paul Jackson in the projection room of the Springbrook Drive-In Theater on or about September 13, 1969."

State v. Joseph, 25 Ohio St. 2d 95, 54 O.O. 2d 228, sets forth the criteria for the sufficiency of Ohio search warrants as tested against federal constitutional standards regarding probable cause prescribed by the United States Supreme Court. The Ohio Supreme Court concluded that the test which we are bound to apply is set forth in Aguilar v. Texas (1964), 378 U.S. 108, 114-115:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones v. United States, 362 U.S. 257, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, was 'credible' or his information 'reliable' . ***"

Although there is nothing in the paragraph in the affidavit referring to informant Springfield to identify the film trailer by name or to show where he had viewed its exhibition, the paragraph in the affidavit relating to informant Jackson not only shows the character and identity of the film trailer and where it had been seen and kept, but identifies Jackson as "Bath Township Constable", a person whom the magistrate as well as the affiant could conclude would be credible in the observations which were related as being made by him and whose information in such respect would be reliable. The affidavit meeting the standards set forth in *Aguilar* we need not be, and are not, concerned with the defendant's claim that the affiant did not personally see an exhibition of the film trailer before seizing it.

Concluding that the search warrant affidavit was sufficient and that no prior adversary hearing as to the obscene character of the film trailer was necessary we also conclude that the defendant has not shown any illegality in the search and seizure. That being the case, it follows that the required production of the film by virtue of a subpoena duces tecum was not in any manner violative of defendant's rights.

Assignment of Error No. V. "The trial court erred in overruling appellant's motion to quash the indictment since the indictment does not afford a record whereby the appellant could successfully assert a plea of double jeopardy."

This assignment refers to a claimed absence from the indictment of a grand jury finding of obscenity, or of any of the elements constituting obscenity, and an absence therefrom of any name or identification of the motion picture film involved.

Each of the counts of the indictment following the language of the statute and the second count thereof relating to possession (R.C. 2905.34) is further qualified by the language indicated by the requirements set forth in State v. Ross, 12 Ohio St. 2d 37. It is the general rule that an indictment in the language of the statute creating and defining the offense on which the prosecution is based is sufficient. In view of the language actually used in the indictment it cannot be reasonably contended that the grand jury failed to find that the film involved was obscene. Finding the whole, it was not necessary for it then to find the separate elements of obscenity.

The claim that the form of the indictment would deprive the defendant of a future plea of double jeopardy has no validity for under the provisions of R.C. 2943.06, the issue of former jeopardy "shall be tried to a jury, and on

such trial the defendant must produce the record of such conviction, acquittal, or jeopardy, and prove that he is the person charged in such record, and *he may also introduce other evidence to establish the* identity of such offense." (Emphasis added.) This statute adequately protects the defendant against the problem which he envisages arising from the failure of the indictment to more fully identify the movie trailer.

Assignment of Error No. I. "The court erred in finding the motion picture "Starlet" obscene."

Under this assignment, the defendant claims that the scenes shown in the subject film trailer are indistinguishable from the types of photography found to be protected by numerous decisions of the United States Supreme Court. When one considers the descriptions of the textual matter in books, of scenes depicted in photographs, and of the content of films, involved in cases where the Supreme Court of the United States has reversed obscenity convictions obtained in state courts it is difficult to know what is and what is not obscene in the view of the Supreme Court of the United States.

Although in September, 1969, the time of the occurrences from which arose the matters for which the defendant stands charged, there was no statutory definition of obscenity existing in Ohio, the Ohio Supreme Court had, nevertheless, arrived in the case of State v. Mazes, 7 Ohio St. 2d 136, 36 O.O. 2d 121, at its own definition based on the definition set forth and agreed to by a minority of the United States Supreme Court in the case of A Book v; Attorney General of Massachusetts (1966), 383 U.S. 413, 86 S. Ct. 975, at least with application to the obscenity of books. That definition arrived at by the Ohio Supreme Court was:

> "In order that a publication may be held to be in violation of Section 2905.34 of the Revised Code, three elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

It must be recognized, however, that in the federal constitutional area involving the freedoms of speech and freedom of the press any definition of obscenity by a state court must yield to the decisions of the Supreme Court of the United States relating to such constitutional rights. But neither in A Book v. Attorney General of Massachusetts, *supra,* nor in any other case has a majority of the Supreme Court settled upon one definition of obscenity. See Requiem for Roth, 69 Mich. L. Rev. 185, and Sensenbrenner v. Adult Bookstore, 26 O. App.2d 183, 189, 55 O.O. 2d 342, 345. It must be concluded from the consistent and controlling application by the Court of the case of Redrup v. State of New York, 386 U.S. 767, 87 S. Ct. 1414, in finding constitutional protection under the First and Fourteenth Amendments to the Constitution of the United States of books, photographs, and films at least as offensive as the film herein involved, that whether the material constitutes hard core pornography, or not, the distribution or exhibition of same is protected by these amendments unless (1) the statute in question in its application to the offense charged reflects a specific and limited state concern for juveniles or (2) there is suggestion of an assault upon individual privacy by publication in a manner

so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or (3) there is evidence of the sort of "pandering" which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942. Thus, although a book, photograph or film might be considered obscene under the definition set forth in State v. Mazes, *supra*, it could be still constitutionally protected if the offense charged did not involve one or more of the exceptions set forth in the Redrup case.

Having viewed the film trailer "Starlet" and reviewed the rest of the record we are of the opinion that there was sufficient evidence of probative value to prove the film obscene under the three prong test set forth in State v. Mazes, *supra*, and alluded to in Redrup v. State of New York, *supra*. The record will not support a conclusion by this court, as a matter of law, that the film trailer was not obscene, as so defined. The film being obscene, are the offenses charged then within any of the exceptions to the operation of the Redrup case?

R.C. 2903.11, the statute under which the first count of the indictment was founded was amended as part of an act "relative to the dissemination of obscene matter to minors" (130 v 658, Amended Senate Bill No. 115) and is directed specifically and solely to prohibiting such dissemination. It therefore, reflects a specific and limited state concern for juveniles.

The offenses under both counts of the indictment occurred by the exhibition of the film trailer without warning to the entire theater audience at a time and under circumstances when it could be expected that they would be looking; indeed, under circumstances, the advertising of a coming attraction, where the defendant wanted them to be looking. The audience not being forewarned of what

was going to be shown the publication of the film was in manner so obtrusive as to make it impossible for any unwilling individual in the audience to avoid exposure to the film.

In Ginzburg v. United States, 383 U.S. 463, 467, 86 S. Ct. 942, 945, the Supreme Court defines pandering in terms set forth in Roth v. United States, 354 U.S. 495, 496, 77 S. Ct. 1314, 1315, as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." That case involved the question of the obscenity of a hardcover magazine, a bi-weekly newsletter and a short book and convictions for the violation of the federal obscenity statute were upheld in view of the defendant's pandering in their production and sale. Here, the question is not whether the full length movie "Starlet" was obscene because of the presence of pandering but merely whether the advertising therefor, the film trailer "Starlet", was obscene. Although the trailer may have constituted pandering for the movie, the element of pandering was not present as to the trailer.

We conclude that the prohibited conduct, as to each count of the indictment, came within at least one of the categories set forth in the Redrup case excepting the film from the constitutional protections recognized by that case. The trial court did not err, therefore, in finding the motion picture trailer "Starlet" (legally) obscene. Compare, State, ex rel. Keating v. Vixen, 27 Ohio St. 2d 278.

Assignment of Error No. IV. "The record is totally devoid of any evidence showing: (1) The obscenity of the motion picture trailer "Starlet." (2) That the defendant knew the film was obscene. (3) That the film introduced into evidence is the same film seized on September 17, 1969."

Under the first portion of this assignment, the defendant claims that the televison station program director offered by the State as an expert witness with respect to establishing community standards was not qualified as an expert. It is difficult for this court to conceive of how one becomes an expert on obscenity. Must he be an obscene person, must he be a person who has no tolerance for obscenity, or must he fall in the middle ground between these extremes? What educational or experience requirements are applicable? The determination of the qualifications of an expert witness is a matter for the trier of facts and rulings with respect thereto will ordinarily not be reversed unless there is a clear showing that the court abused its discretion. Cities of Canton, etc. v. Public Utilities Commission, 87 S. Ct. 62, 385 U.S. 828 and In re Ohio Turnpike Commission, 164 Ohio St. 377. The proffered expert was, as a program director, fully familiar with the film fare offered to the public by television stations both locally and nationwide and fully familiar with its acceptability to the public. We are of the opinion that the defendant has not shown a clear abuse of discretion by the trial court in admitting his opinion testimony.

The assertion by the defendant that the record is totally devoid of any evidence showing obscenity is not only well taken because such expert testimony was admissible but also because the subject film trailer was evidence, in and of itself, of its obscenity.

As to the assertion that there is no evidence that the defendant knew the film was obscene, the evidence is fully sufficient to show that the defendant had knowledge of the content and character of the film from which it may be inferred that he knew that it was obscene as a matter of fact. There is no requirement that he be able to arrive at a conclusion that the same was obscene as a matter of law.

As to the identity of the film introduced into evidence it must be remembered, in the first place, that each of the counts with which the defendant was charged relates to the possession of an obscene film. There is no requirement in law that the particular film possessed must be produced in court to prove the commission of the crimes. Indeed, if there is other evidence to prove the elements of the crimes it is conceivable that the charges could be proved without the production of any film, subject only to the best evidence rule which is based primarily on the matter of availability. Although the evidence adduced would have supported an inference that the film produced in evidence was the same film as that which was the subject matter of the charges, the important thing here is not such identity but that the film produced in evidence shows identically the same things that were shown by the film which was the subject matter of the charges and thus tends to be proof, in this case conclusive of its content. The record was replete with evidence of such identity and defendant's claim is without merit.

Having found no error prejudicial to the defendant in any of the particulars assigned and argued the judgment of the trial court must be affirmed.

Judgment affirmed.

YOUNGER, P.J., and COLE, J., concur.

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1339

ROBERT BOYD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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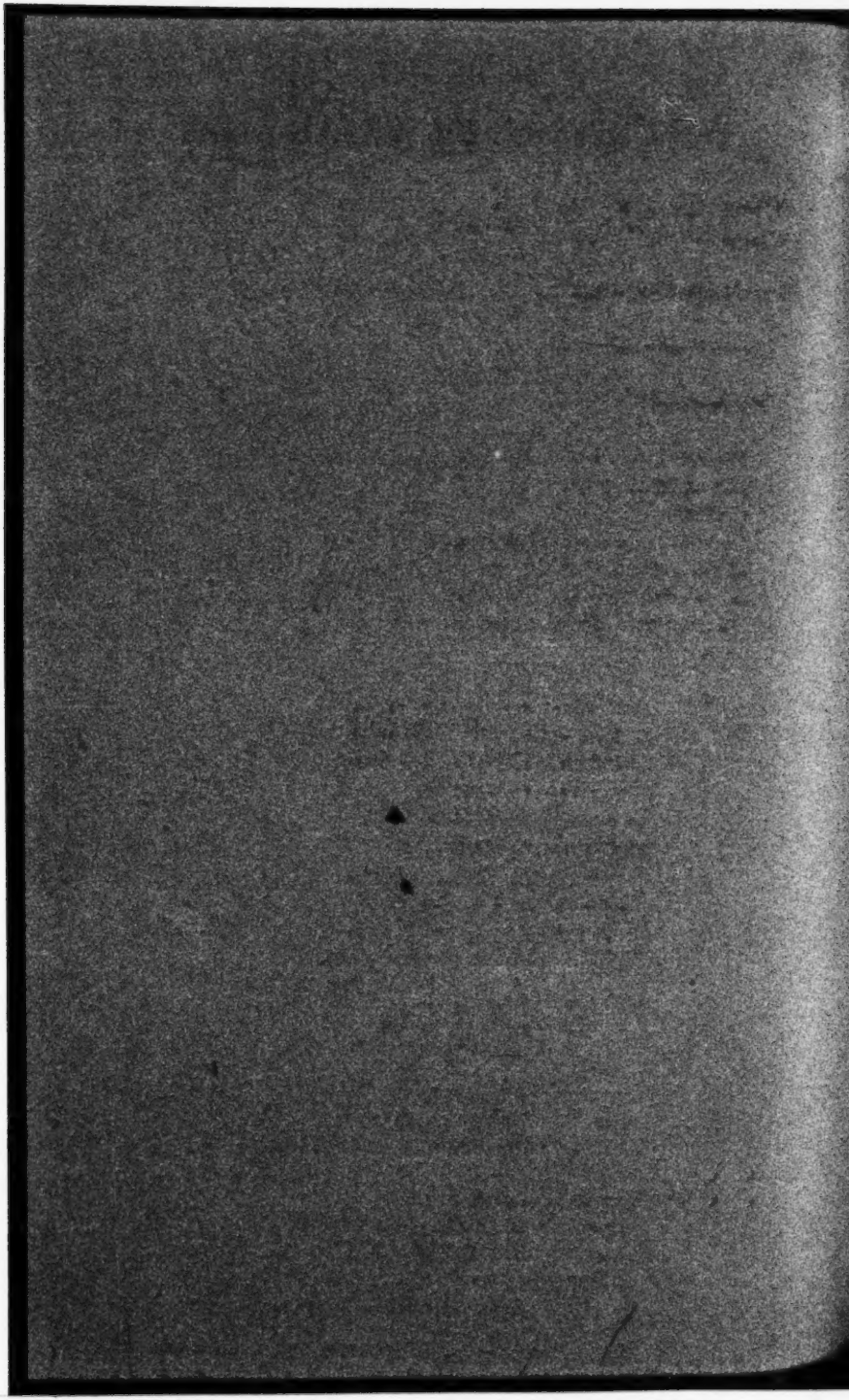

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1339

ROBERT BOYD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

By letter dated April 12, 1974, Respondent was informed by the Clerk of this Court as follows:

"The Court has directed this office to request that a response be filed in this case . . ."

Pursuant to such request, Respondent submits the following response.

QUESTIONS PRESENTED

Respondent submits one additional question to the four already presented in the petition for writ of certiorari..

5. Whether, Under Recognized Principles of Waiver, A Person Called As A Witness Under A Subpoena Duces Tecum Can Be Compelled To Produce A Motion Picture Film Whose Identity And Existence Has Previously Been Established By An Affidavit In Support Of The Issuance Of The Subpoena And Where There Is A Showing By Independent Evidence That Such Film, At The Time Of Service, Was In the Possession Of Such Witness For The Purpose of Exhibiting The Same To The Public As A Part of A Commercial Venture And In The Face Of A Judicial Challenge Alleging Damage To Public Morals.

STATEMENT OF FACTS

On September 13, 1969, Petitioner Robert Boyd, manager of the Springbrook Drive-In Theater near Lima, Ohio, caused a seven-minute trailer to be exhibited at that theater, advertising the movie "Starlet", in which a nude female appeared with her pubic area and other private parts of her body fully exposed

and, which depicted: (1) a nude male and female engaged in the act of sexual intercourse, and (2) an act of oral sodomy performed by the nude female. Viewing the film in the audience at that time were many young children, including three boys of less than eleven, nine, and seven years of age in one car, and a boy of eleven years of age in another car. (See State of Ohio v. Boyd, 300 N. E. 2 752 at 755, a copy of which appears herein at Appendix A.)

On September 17, 1969, a search warrant was issued by Lima Municipal Court Judge Roger D. Andrews, upon the affidavit of William H. Dailey, Jr. (notarized by Allen County Prosecutor, Lawrence S. Huffman), who deposed that he had good cause to believe that the offense of knowingly exhibiting an obscene film in violation of R. C. section 2905. 34 had been committed on September 13, 1969, averring in support thereof that he had received information from two sources: (1) from Paul Jackson, Bath Township Constable, that Jackson had viewed exhibitions of said film trailer with the above described content on several occasions prior to September 13, 1969, and, on or about September 13, 1969, Jackson had seen the motion picture trailer itself in a metal container in the projection room of the Springbrook Drive-In and (2) from E. L. Stringfield of 3364 Allenton

Road, Lima, Ohio, that Stringfield had viewed the exhibition of said film trailer with the same content on September 13, 1969. (Petition for Writ of Certiorari, Appendix pp. 3a - 5a).

On September 17, 1969, a deputy sheriff executed the search warrant by handing the search warrant to petitioner Boyd on the steps of the projection booth of the theater. Boyd obtained the trailer from the floor of the projection booth and instructed the projectionist to remove advertising clips from it. Thereupon, the deputy sheriff took the same into his custody. (Ohio v. Boyd, 300 N. E. 2 752 at 755.)

The Allen County Grand Jury thereafter indicted Petitioner Boyd on two counts: (1) a violation of R. C. section 2903. 11 in that on September 13, 1969, he "did unlawfully and knowingly have in his possession for the purpose of exhibition to a minor under the age of eighteen years, a motion picture which is obscene . . ." and (2) a violation of R. C. section 2905. 34 in that on September 17, 1969, he "did unlawfully, and knowingly have in his possession and under his control an obscene . . . motion picture film for the purpose of exhibition and dissemination." (Ohio v. Boyd, 300 N. E. 2 752 at 754, 755)

A motion by Petitioner to suppress the film as evidence was overruled by the state court. Thereafter, Petitioner filed a collateral action

in the United States District Court in Toledo, entitled Boyd v. Huffman In the United States District Court For the Northern District of Ohio, Western Division, No. 70-296, asking the federal court to order Allen County Prosecutor Huffman to return the film due to the prior restraint resulting from the seizure.[1] On November 2, 1970, United States District Judge Don J. Young ordered the film returned. In compliance with the federal court order, Allen County Prosecutor Huffman returned the film to the Petitioner, coupled with a subpoena duces tecum ordering the Petitioner to bring the film with him to his trial.[2] (Petition for

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1. See Judge Young's letter of Oct. 22, 1970 re the consequences of a federal court order to return the film at Appendix B-3.

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2. Petitioner Boyd thereafter moved in the federal district court action for an order requiring County Prosecutor Huffman to show cause why he should not be adjudged in contempt of the November 2, 1970 judgment rendered by United States District Court Judge Don J. Young. A copy of United States District Judge Young's opinion of December 22, 1970, in Boyd v. Huffman, No. 70-296, denying the motion, is attached to this Brief at Appendix B-5. In such opinion, United States District Judge Young held:

"Other courts, relying upon the decision in Delta Book, supra, have viewed the use of a subpoena duces tecum as a constitutionally sanctioned method of ordering an allegedly obscene film into court, either for a prior adversary hearing, or for the actual criminal trial. See e.g. Bethview

Certiorari, Statement of the Case at page 3.)

Petitioner filed motions to quash the subpoena duces tecum. to quash the indictment and a de-

---

> Amusement Corp. v. Cahn, 416 F2 410, 412 (2nd Cir. 1969) Carroll v. City of Orlando, 311 F. Supp. 967, 969(M. D. Fla. 1970)."

Federal District Judge Young's ruling and the results reached in this case (Boyd v. Huffman) should be compared with the ruling of Federal District Judge Nicholas Walinski (also of the Northern District of Ohio) and results reached in Smith v. Fair and Huffman, 363 F. Supp. 1021 (1973), affirmed by the sixth circuit in Smith v. Fair and Huffman ___F2___ (April 17, 1974), (petition for certiorari in the process of being prepared for filing in this Court.) Having been instructed by Federal District Judge Young of the federal bench that he should not proceed by search warrant process, but should use the subpoena duces tecum process, Allen County Prosecutor Huffman was later to learn in Smith v. Fair, supra, that the "collateral" instructions of one federal court given while the state action was in train, would not be followed in other cases by judges on the same (sixth) circuit at either the trial or appellate levels. See Justice Black speaking for this Court in Perez v. Ledesma, 401 U. S. 82, 27 L. Ed. 2d 701, 915 S. Ct. 674 at 84:

> "It is difficult to imagine a more disruptive interference with the operation of the State criminal process short of an injunction against all state proceedings..."

Respondent submits that the possibility for recurrence of such disruptive interferences is immeasurably increased by this Court's recent ruling in Steffel v. Thompson, ___ U. S. ___ 39 L. Ed. 2d 505, 94 S. Ct. ___ (March 19, 1974.)

murrer. All motions were overruled by the trial court and affirmed by the Ohio appellate courts.

At trial, the trailer "Starlet" was admitted into evidence over Petitioner's objections. On May 20, 1971, the Petitioner was convicted of both counts of the indictment by the Allen County Court of Common Pleas and fined $2,000.00 on each count.

Notice of Appeal was filed on May 24, 1971. On July 19, 1971, the Court of Appeals dismissed the appeal for premature filing. The Supreme Court of Ohio reversed and remanded to the Allen County Court of Appeals on May 3, 1972.

On remand, the Allen County Court of Appeals affirmed the Court of Common Pleas decision in State of Ohio v. Boyd, 300 N.E.2 752 (December 18, 1972). A copy of said opinion appears herein at Appendix A.

Petitioner appealed the Allen County Court of Appeals decision to the Ohio Supreme Court. On April 6, 1973, the Supreme Court of Ohio overruled Petitioner's motion for leave to appeal.

After the decision of Miller v. California, 413 U.S. 13, Petitioner filed a supplemental motion requesting the Supreme Court to review the Constitutionality of the Ohio statutes involved at bar in light of Miller.

On December 5, 1973, the Supreme Court of

I.

THE OHIO SUPREME COURT DID NOT ERR WHEN IT OVERRULED PETITIONER BOYD'S MOTION FOR LEAVE TO APPEAL AND DENIED THE PETITION FOR A REHEARING WHICH PETITIONER FILED SUBSEQUENT TO THIS COURT'S DECISIONS IN MILLER V. CALIFORNIA, ET AL.

A. The Decision of the Court of Appeals of Ohio, Allen County, That the Trailer For the Film "Starlet" Was Obscene Under The Three Prong Minority "Memoirs" Test Did Not Constitute Reversible Error. The "Memoirs" Test Is A Stricter Test and Was More Favorable to Petitioner Than Is Required Under Miller v. California.

In its opinion on December 18, 1972, in Ohio v. Boyd, 35 Ohio App. 2d 147, 300 N. E. 2d 752, affirming the convictions in the trial court below, the Court of Appeals of Ohio, Allen County, applied the so called "Memoirs" test, as the definition for "obscene" arrived at by the Ohio Supreme Court in Ohio v. Mazes, 7 Ohio St. 2d

136, 218 N. E. 2d 725 at 758:

> "In order that a publication may be held to be in violation of Section 2905. 34 of the Revised Code, 'three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' "

In reviewing the subject matter in the light of that test, the Court of Appeals concluded:

> "Having viewed the film trailer, 'Starlet' and reviewed the rest of the record, we are of the opinion that there was sufficient evidence of probative value to prove the film obscene under the three prong test set forth in State v. Mazes, supra, and alluded to in Redrup v. State of New York, supra. The record will not support a conclusion by this court, as a matter of law, that the film trailer was not obscene, as so defined."

The Ohio Supreme Court, in denying the petition for rehearing on December 5, 1973, was justified

in concluding that, upon review of the record herein, this Court's decision in Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2, 419 did not present a federal question which necessitated this Court's review of the conviction herein. Compare the decisions of the Ohio Supreme Court on September 26, 1973, (interpreting this Court's rulings in obscenity cases on June 21, and June 25, 1973) in a civil case: State of Ohio ex rel Keating v. "Vixen", 35 Ohio St. 2d 215, 301 N. E. 2d 880 (adhering to its former decision in State of Ohio ex rel Keating v. "Vixen" 27 Ohio St. 2d 278, 272 N. E. 2d 137 (July 21, 1971) and in two criminal cases: State of Ohio v. Blair 35 Ohio St. 2d, 223, 301 N. E. 2d, 696, and State of Ohio v. Albini, 35 Ohio St. 2d, 222, 301 N. E. 2d 694 (reversing criminal convictions on the ground of illegal seizures.)

By the time that the Ohio Supreme Court acted to deny the petition for rehearing herein, a substantial number of other state courts had interpreted the impact of this Court's decisions in Miller v. California, et al., supra, on criminal convictions under "Memoirs" guidelines, handed down prior to June 21, 1973, and concluded either that (1) specificity was not required unless some test other than the "Memoirs" test was employed. California v. Enskat, 109 Cal. Rptr. 433 at 440,

441 (August 8, 1973), or (2) that a conviction under the "Memoirs" test was not to be upset where the Court's previous construction had also placed the offenders on notice as to what was forbidden. Rhodes v. Florida, 283 So. 2d 351 (September 19, 1973), Slaton v. Paris Adult Theatre I, 201 S.E. 2d 456 at 459 (October 30, 1973), Jenkins v. Georgia, 199 S.E. 2d 183 at 184 (July 2, 1973) or, (3) that no serious problem was presented since the "Memoirs" test was "more restrictive," was "more stringent", and the "additional burden . . . assumed by the State" could not possibly have injured the defendants. Richards v. Texas, 497 S.W. 2d 770 at 777 fn (1) (July 2, 1973).

In California v. Enskat, 109 Cal. Rptr. 433 the California Court of Appeal adopted the first construction, at page 440:

> "In the second place, language in Miller itself indicates that the intent of the Court was only to require increased specificity in the state laws if the 'utterly without redeeming social value' test was abandoned. Thus, in summing up its holding, the Supreme Court said, among other things, that ". . .(W)e . . . hold that (obscene) material can be regulated by the States, subject to the specific safeguards enunciated above, without

a showing that the material is 'utterly without redeeming social value', . . . "(Miller at ___, 93 S. Ct. at 2622, emphasis by the United States Supreme Court). The Supreme Court nowhere holds that the "utterly without redeeming social value" test is itself unconstitutional. The precise language used by the Court is set forth in the margin."

"In the third place, there is no reason at all why-state law cannot impose more strict requirements on the prosecution as to the definitions of obscenity than the constitution would require. That, in effect, is what the "utterly without redeeming social importance" formulation does."

The Florida and Georgia Supreme Courts relied upon the second construction noted above. In Rhodes v. Florida, 283So. 2d 351 (September 19, 1973) the Florida Supreme Court held at page 359:

"Sub judice, authoritative judicial decisions had been published which placed this defendant on notice of the proscribed conduct and the trial and conviction were pursuant to the more severe test then applying that the material was 'utterly without redeeming social value.' "(our emphasis.)

In Slaton v. Paris Adult Theatre I, 201 S.E.2d 456 (October 30, 1973) the Georgia Supreme Court similarly noted that the Georgia "Memoirs" test, as construed to include specific standards, offered greater protection to free speech, at page 459:

> "The appellees contend that the Georgia statute as construed cannot be applied retroactively and that any detriment found in the Miller guidelines, as opposed to the prior Memoirs guidelines (Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966)), upon which Code Ann. §§ 26-2101(b) is based, cannot be imposed upon them save in violation of due process of law."
>
> "The reply to this argument is that the Georgia statutory definition has been previously authoritatively construed by this court to include those standards for obscenity as permitted by Miller. In addition, the Miller guidelines allow a state to regulate material lacking in serious literary, artistic, political, or scientific value, whereas under the Memoirs test, (Code Ann. §§ 26-2101(b) the material also must be shown to be 'utterly without redeeming social value.' See Jenkins v.

State, 230 Ga. 726, 199 S. E. 2d 183 (1973). Thus, the Memoirs test, as construed to include standards offering greater protections to free speech and expression than those in Miller, is fully applicable to the pre-Miller defendant. (our emphasis.)

Representative of the third and simpler construction is the language of the Texas Court in Richards v. Texas, 497 S. W. 2d 770 at 777 fn. 11:

"After quoting from A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Massachusetts, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), and § 1 of the Act, Judge Odom in West, supra (489 S. W. 2d at 604, fn. 16), continued: "Since the statutory definition almost follows word-for-word the definition promulgated by the Supreme Court in Memoirs, we perceive no significant differences in these definitions. See Bryers v. State, supra (Tex. Cr. App. 480 S. W. 2d 712). See also, Newman v. Conover, 313 F. Supp. 623 (N. D. Tex. 1970).'

"Although the Memoirs requirement that the material be proved to be 'utterly without redeeming social value' was removed in Miller (——U. S. at——, 93 S. Ct. 2607), we do not believe that the additional burden of

establishing this negative fact, assumed by the State in this case, could possible have injured defendants." (our emphasis.)

See also Maita v. Whitmore, 365 F. Supp. 1331 at 1336-1337 (November 9, 1973.)

It seems clear that, even under the most restrictive of the constructions noted above, petitioner was not entitled to a reversal of his conviction under the Ohio "Memoirs" guidelines. See City of Youngstown, Ohio v. De Loreto, infra,

1. The Ohio Judiciary, Through Decisional Law, Has Engrafted Specific Standards Onto the Term "Obscene" as Used in the Ohio Obscenity Laws.

The Ohio Judiciary has, for a long time, followed a policy of construing the obscenity laws of the State of Ohio in a manner which rendered the word "obscene" specific. City of Youngstown, Ohio v. De Loreto, 251 N. E. 2d 491 at 500, 48 Ohio Op. 2d 393 (September 10, 1969); State of Ohio ex rel Ewing v. Without a Stitch, 57 Ohio Op. 2d 184 at the footnote on page 187 (July 9, 1971); and State of Ohio ex rel. Keating v. Vixen, 272 N. E. 2d 137 at 141, 142, 27 Ohio St. 2d 278 (July 21, 1971) as adhered to on remand in Ohio ex rel. Keating v. Vixen, 37 Ohio St. 2, 215, 301 N. E. 2d 880 (September 26, 1973). In Black on "Interpretation of

Laws", Second Edition, the author comments as follows on the significance of such authoritative rulings, at page 616:

> "It is an ancient maxim of the law that 'legis interpretatio legis vim obtinet'; that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law, by becoming, as it were, a part of the statute itself. The importance of adhering to this rule is seen in the fact that the judicial explanation of an obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. 'The court almost always, in deciding any question, creates a moral power above itself.' "

Further, the Ohio Legislature has codified such judicial decisions in legislation (effective September 15, 1970) of the type which was exemplified by this court in California v. Miller, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (June 21, 1973), and which this court wrote into the federal statutes as a federal standard in U.S. v. 12-200ft.

Reels of Super 8MM Film, 413 U. S. 123, 37 L. Ed. 2d 500, 93 S. Ct. 2665. The author of the 1970 legislation was Presiding Judge Lynch, who wrote the opinion in City of Youngstown, Ohio v. De Loreto, supra.

The common standards of right and wrong embodied in the criminal statutes of Ohio dealing with sexual morality have, by judicial construction, been subsumed in the term "obscene" as used in the obscenity statutes. If such depictions are accompanied with the same "mens rea" which defines an offense under the criminal statutes, such also is in violation of the specific standards prescribed by the term "obscene." In De Loreto, supra, Presiding Judge Lynch, author of the 1970 Legislation, in examining several sex magazines on appeal, enumerated the state statutes and city ordinances which prohibited immoral conduct. From that the Court deduced what the moral standards of Ohio people on sex were, at page 500:

> "The moral standards of the people in Ohio on sex are readily ascertainable because of the statutes that have been enacted on the subject. Youngstown has similar ordinances to the statutes of the state of Ohio."

OHIO LAWS INDICATING SEX MORAL STANDARDS

"Laws of Ohio and the city of Youngstown relating to sex, which indicated the moral standards of the people of Ohio, prohibit the following:

"1. Adultery or fornication. Section 2905.08, Revised Code. Youngstown City Ordinance 132.03.

"2. Prostitution. Sections 2905.14 and 2905-27, Revised Code. Youngstown City Ordinance Sections 132.01, 132.04, and 132.06.

"3. Any person eighteen years of age or over wilfully making an indecent exposure of his person in a place or in a place where there are other persons to be offended or annoyed thereby, or solicit another to engage in an act of sex perversion. Section 2905.30, Revised Code. Youngstown City Ordinance 132.11.

"4. Any person eighteen years of age or over wilfully exposing his or her private parts in the presence of two or more persons of the opposite sex. "Private Parts" means the external genitalia of the human body. Section 2905.31, Revised Code.

"5. Sodomy, Section 2905.44, Revised Code.

MORAL STANDARDS OF OHIO PEOPLE ON SEX

"Thus, the laws of Ohio and the City of Youngstown prohibit extra-marital sexual relations, as offensive to the moral standards of the people of Ohio. Nudity to the extent of exposing the external genitalia of a male or female human body is also prohibited as likely to incite or encourage extra-marital sexual relations."

"We hold that one of the purposes of Section 2905.34, Revised Code, and of Youngstown City Ordinance Section 132.09 (a), is directed at obscene publications that are likely to incite or encourage sexual conduct contrary to the moral standards of the people of Ohio." (Our emphasis.)

Hamilton County Common Pleas Judge Leis, in his trial court opinion in Ohio ex rel. Keating v. Vixen, dated November 17, 1969, applied the same rationale in his evaluation of the contemporary standards of the community. See Appellants' Statement as to Jurisdiction in A Motion Picture Film Entitled "Vixen" et al v. State of Ohio, ex rel Keating, No. 71-599 at page 13a.

"The Court, under its prerogative to believe or disbelieve, or accept all or part, or none of the testimony and evidence presented, is of the opinion that such testimony does not reflect the true feeling and acceptability by the community of 'Vixen' type of film. First of all, acceptability by an audience is not the true criteria of the measurement of the community standard, and acceptance of a film by the community, because the attending audience is but a segment of the community, and I might say a very small segment of the Community."

"A proper criteria for evaluation of the contemporary standard of the community is its establishment and enforcement of laws governing the conduct of its citizenry. A simple reference in the Ohio Revised Code sets forth the moral standards of the people of Ohio, including this community, on sex matters. These laws are enforced in this community, and include:

Adultery or Fornication - Section 2905.08 O. R. C.

Prostitution - Section 2905.10 O. R. C.

Indecent Exposure - Section 2905.30 O. R. C.

Solicitation of Unnatural Sex Act - Section 2905. 30 O. R. C.

Nudism - Section 2905. 31 O. R. C.

Incest - Section 2905. 07 O. R. C.

Rape - Section 2905. 01(etc.)O. R. C.

Sodomy - Section 2905. 44 O. R. C.

"These laws as well as local ordinances set forth the moral standard of the community, and under proper presentation, they are enforced."

"In the case of Trans Lux Distributing Corp. v. Board of Regents (248 N. Y. S. 2d 857), Judge Burke states 'It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street.' "

"The community does not allow, or condone, fornication on the street corner, or any public display of nakedness. Bare-bosom women are not permitted to walk the streets. If this happens, prosecution follows. If the community does not accept (and permit) public display of sex acts and nakedness on its streets and in public places, can it be said that a movie displaying such conduct meets the standards of its community? Definitely not."(Our emphasis)

The Ohio Supreme Court in its opinion in State ex rel. Keating v. Vixen, 27 Ohio St. 2d 278, 272 N. E. 2d 137 (July 21, 1971) removed all doubt that the above decisional law represented an authoritative interpretation of the word "obscene" in the State of Ohio, at page 140:

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse."

"Since the real issue before this court is whether the injunction should be dissolved, or continued in force and effect, R. C. § 2905. 34 and 2905. 35 are applicable at this time notwithstanding their enactment postdates the injunction granted below."

"Those two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that: 'No person, with knowledge of the content and character of the *** motion picture *** involved, shall *** present such motion picture *** before an audience which contains a series of display *** of ***

sexual intercourse *** the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is *** for commercial exploitation. *** (Emphasis supplied.) So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print, or distribute information or opinion.' Schneider v. State (1939), 308 U.S. 147, 161, 60 S. Ct. 146, 150, 84 L. Ed. 155."

"Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial expli-tation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that 'Vixen' does depict numerous acts of purported sexual intercourse, and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes." (Our emphasis) ***

"Therefore, where scenes in a motion picture film depict purported acts of sexual

intercourse and are exhibited for commercial exploitation, those scenes are violative of R. C. §§ 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R. C. § 3767.01, and their exhibition may be enjoined as provided in R. C. §§ 3767.02 et seq. "(Our emphasis.)

B. The Ruling of the Court of Appeals of Ohio, Allen County, That the Affidavits in Support of the Issuance of the Search Warrant Met Federal Constitutional Standards for "Probable Cause" Was Not Erroneous.

The criteria utilized by the Court of Appeals, (See Ohio v. Boyd, 300 N. E. 2d 752 at 756.) in testing the sufficiency of the affidavits in support of the search warrant for "probable cause" under federal standards were those set forth by this Court in Aguilar v. Texas, 378 U. S. 108, 114-115, 12 L. Ed. 2, 723, 84 S. Ct. 1509, 1514:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, the magistrate must be informed of (1) some of the underlying circumstances from which the

informant concluded that the narcotics were where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887, was 'credible' or his information 'reliable.' *** "

The information contained in the affidavit relating to informant Jackson, namely:

"Affiant further says that the facts on which belief is based, is information received from Paul Jackson, Bath Township Constable; that he has viewed exhibitions of said motion picture film trailer of the moving picture 'Starlet' on several occasions prior to September 13, 1969; that said motion picture film trailer is in color; that its exhibition lasts approximately seven (7) minutes on the screen; that it depicts a nude male and female engaged in the act of sexual intercourse; that it depicts an act of oral sodomy performed by the nude female and that the nude female appears with her pubic area and other private parts of her body fully exposed; that said motion picture film trailer is contained in a metal container designed for the purpose of storing said

film and was seen by the said Paul Jackson in the projection room of the Springbrook Drive-In Theater on or about September 13, 1969."

not only shows the character and identity of the film trailer and where it had been seen and kept, but identifies Jackson as a "Bath Township Constible", a person whom the magistrate as well as the affiant (County Prosecutor's Office) could conclude would be credible in the observations which were related as being made by him and whose information in such respect would be reliable.

Under the obscenity laws of the State of Ohio as interpreted by the State Judiciary (See Point I A 1 at page 15 supra..), such information in Constable Jackson's affidavit regarding explicit sexual conduct (sexual intercourse, sodomy, etc.) being portrayed in a 7-minute trailer on a public screen of a drive-in motion picture theater afforded the issuing magistrate with the necessary information to "focus searchingly on the question of obscenity". Heller v. N. Y., 413 U. S. 483, 37 L. Ed. 2 745, 752, 93 S. Ct. 2789. For example, the act of sodomy has uniformly been rejected by civilized society as unnatural, scandalous, and contrary to fundamental moral standards, a concrete fact which is inherent in this Court's recent unanimous reversal in Stone v. Wainwright and Huffman __U. S. __, 38 L. Ed. 2d 179, 94 S. CT. (Nov. 5, 1973) which suggested the contrary.

See Stone and Wainwright v. Huffman, supra at 181:

> "We reverse. We perceive no violation of the "underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617, 98 L.Ed. 989, 74 S.Ct. 808 (1954). Stone was convicted for copulation per os and per anum, Huffman for copulation per anum. These very acts had long been held to constitute "the abominable and detestable crime against nature" under § 800.01 and predecessor statutes. Delaney v. State, 190 So.2d 578 (Fla Sup Ct. 1966), appeal dismissed, 387 U.S. 426, 18 L.Ed.2d 866, 87 S.Ct. 1710 (1967), declared as much." (Our emphasis.)

Since this is so, a filmed presentation of similar conduct, whether real or simulated, is equally objectionable. (See Point I A 1 at page 21, supra)

In Draper v. U.S., 358 U.S. 307, 3 L. Ed.2d 327, 79 S.Ct. 329 (1959), this Court recognized that "probable cause" as the name implies, involves probabilities; that these are not technicals, but are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act; and that probable cause exists where the facts

and circumstances within the arresting officer's knowledge and of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

The standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest are at least as stringent as the standards applied with respect to the magistrate's assessment. Whiteley v. Warden of Wyoming State Penitentiary, 401 U. S. 560, 566, 28 L. Ed. 2d 306, 312, 91 S. Ct. 1031 (Mar. 29, 1971). Such standards, however, do not require that quantum or quality of proof which is necessary to establish guilt, "probable cause" for an arrest may exist even though the person arrested turns out to be innocent. Henry v. U. S., 361 U. S. 98, 102, 4 L. Ed. 2d 134, 138, 80 S. Ct. 168 (Nov. 23, 1959).

The question is not whether the person responsible for the arrest thought the facts to constitute probable cause, but whether the Court thinks that such facts constituted probable cause. Director General of Railroads v. Kastenbaum, 263 U. S. 25, 68 L. Ed. 146, 44 S. Ct. 52 (1924). When the constitutional validity of an arrest is

challenged, it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed. Beck v. Ohio, 179 U. S. 89, 13 L. Ed. 2d 142, 148, 85 S. Ct. 223 (1964).

As was suggested by this Court in Roaden v. Kentucky, 413 U. S. 496, 37 L. Ed. 2d 757, 763, 93 S. Ct. 2796, a seizure under a search warrant, reasonable as to one type of material in one setting, may be unreasonable in a different setting or with respect to another kind of material.[3]

C. The Ruling of the Court of Appeals of Ohio, Allen County, That a Film Which Has Been Legally Seized Under a Search Warrant and Then Returned May be Ordered Produced Pursuant to a Subpoena Duces Tecum, was not Erroneous.

Any uncertainty as to the correctness of the ruling which existed at the time that the

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3. It should be emphasized that only the 7 minute trailer for the film "Starlet" was seized. The two feature films and other advertising material in the trailer were left with the theater. See Statement of Facts at page 4.

Court of Appeals handed down its decision in this case has been entirely resolved by this Court's decision in Heller v. New York, 413 US 483, 37 L.Ed.2d 745, 754, 93 S.Ct. 2789:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that

showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned."

Heller, supra, mandates the return of a copy of the film, though lawfully seized under a search warrant, when the person from whom it was taken persists in his claim of a right to exhibit the same publicly, pending the judicial determination of the obscenity issue. Petitioner's claim that the original, where returned, may not, on the constitutional grounds of self-incrimination be thereafter ordered produced for trial under a validly executed subpoena duces tecum process flies in the face of this Court's instruction in Heller, supra, that "the Court should permit the seized film to be copied so that (the public) showing can be continued pending a judicial determination of the obscenity issue".

It makes no sense to say that, whereas the trial judge had the power to issue a search warrant and require that the films be brought before him immediately (Heller v. New York, 413 U. S. 483, 37 L. Ed. 2d 745, 752, 93 S. Ct. 2789 (June 25, 1973), he did not also have the power to permit the person against whom the Court's process was directed to retain the same in his possession and require that they be delivered in Court at a stated date and time.

II.

THE TRIAL COURT'S ORDER THAT THE FILM MUST BE PRODUCED UNDER THE SUBPOENA DUCES TECUM CAN ALSO BE SUSTAINED ON INDEPENDENT GROUNDS THAT (A) THE POSITIVE MOTION PICTURE PRINT WAS REAL OR PHYSICAL (NOT TESTIMONIAL EVIDENCE); (B) USED IN A COMMERCIAL VENTURE FOR OPEN DISPLAY TO THE PUBLIC, AND (C) THE CONTINUING CLAIM OF A RIGHT TO DISPLAY THE SAME PUBLICLY FOR PROFIT, WHEN BALANCED AGAINST A JUDICIAL CHALLENGE ALLEGING DAMAGE TO PUBLIC MORALS, CONSTITUTED A WAIVER BY LAW OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Reliance of Petitioner Boyd Upon the Fifth Amendment Privilege Against Self-Incrimination is Misplaced.

The trial court had the power to order Petitioner to produce real or physical evidence (the positive print) which was being used to project sound and visual images onto the public motion picture screen. In U. S. v. Dionisio, 410 US 1, 35 L.Ed. 2d 67, 75, 93 S. Ct. 764 (Jan. 22, 1973) this Court, in holding that a person could

be required to give a voice exemplar to the Grand Jury, to be compared by them for identification purposes with certain wiretap recordings, cited language from Schmerber v. California, 384 US 757, 16 L.Ed.2d 908, 86 S.Ct. 1826, holding:

> "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it . . . ." (Our emphasis.)

The Court in Dionisio also stated as to the extent of the power of government to seize that which a person knowingly exposes to the public vis-a-vis a Fourth Amendment claim, at page 79:

> "In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public even in his home or office . . . . '" (Our emphasis.)

None of the cases cited by Petitioner Boyd involve fact situations in which the person claiming the privilege was also claiming a right in tandem to broadcast the subject matter to the

public at large as part of a commercial venture and in the fact of a judicial challenge alleging damage to public morals. In Couch v. U. S., 409 U. S. 322, 34 L. Ed. 2d 548, 93 S. Ct. 611 (June 9, 1973), relied upon by Petitioner (see Petition at p. 10), this Court, in addressing itself to the policy and purpose of the Fifth Amendment privilege, held that no Fifth Amendment claim can prevail where there is no legitimate expectancy of privacy and no semblance of governmental compulsion against the accused's person, at page 554:

> "In Murphy v. Waterfront Commission, 378 U. S. 52, 55, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964), the Court articulated the policies and purposes of the privilege:
>
> > "'Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which

> dictates "a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," . . . .'
>
> "It is important to reiterate that the Fifth Amendment privilege is a personal privilege; it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: 'A party is privileged from producing the evidence but not from its production.' Johnson v. U. S., 228 U.S. 457, 458, 57 L.Ed. 919, 33 S.Ct. 572 (1913)." (Our emphasis.)

In its concluding paragraph in Couch, the United States Supreme Court emphasized that where no reasonable expectation of privacy existed, the privilege could not prevail as against the legitimate interest of society in the enforcement of its laws (which Respondent submits includes the implementation of process in the form of a

subpoena duces tecum and the safeguarding of public morals):

> "The criterion for Fifth Amendment immunity remains not the ownership of property, but the 'physical or moral compulsion exerted.' Perlman, 247 U.S. at 15, 62 L.Ed. 50. We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused. It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues . . . . " (Our emphasis.)

B. Under Recognized Principles of Waiver a Person Called as a Witness Under a Subpoena Duces Tecum Can be Compelled to Produce a Motion Picture Film Whose Identity and Existence has Previously Been Established by an Affidavit in Support of the Issuance of the Subpoena and Where There is a Showing by Independent Evidence that Such Film, at the Time of the Service, Was in the Possession of Such Witness for the Purpose of Exhibiting the Same to the Public, as a Part of a Commercial Venture and in the Face of a Judicial Challenge Alleging Damage to Public Morals.

Petitioner Boyd's claim was before the Arizona Supreme Court in Anderson v. Coulter, Jr. and City of Phoenix, 108 Ariz. 388, 499 P. 2d 103 (June 29, 1972). Petition for certiorari denied in William Anderson v. City of Phoenix et al., __ U. S. __, 36 L. Ed. 2d 189, __ S. Ct. __ (Mar. 19, 1973) with Justice Douglas dissenting. In denying that the privilege against self-incrimination could be invoked under the instant facts, the Arizona Supreme Court ruled at page 106:

"We believe that reliance upon the Fifth Amendment to prevent the production of a film that has been previously exhibited to the public is misplaced. Having the protection of the First Amendment and asserting it as the defendant does here, it seems to us both illogical and irrational to say, particularly where the item has been exhibited to the public, that the defendant may then rely upon the privilege against self-incrimination to refuse to produce the film at the prior adversary hearing. We agree with Justice Traynor concerning the extent of the testimonial privilege.

"* * * When the prosecution has ample evidence of the existence, identity, and authenticity of documents in the defendant's possession and thus does not need to rely on his knowledge to locate and to identify them or on his testimony to authenticate them, it may be that his implied admission alone that the documents produced were

those he was ordered to produce would involve too trivial a degree of incrimination to justify invoking the privilege. (See Maguire, Evidence of Guilt, pp. 22-23; Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687, 699-701.) * * *.' Jones v. Superior Court of Nevada County, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P. 2d 919, 921, 96 A. L. R. 2d 1213 (1962).

"In this case, the prosecution's 'ample evidence' of the 'existence, identity, and authenticity' of the movie was expressly shown in the subpoena duces tecum. It is obvious that the prosecution had everything it needed to identify the film and compliance with the subpoena duces tecum did no more than produce the film already known by both the prosecution and the court to exist.

"We believe that a person who exhibits to the public an allegedly obscene film has, by that show-

ing, waived his right to claim his privilege against self-incrimination when subpoenaed to produce the film at the prior adversary hearing, provided the prosecution has properly identified the film to be produced.

"We therefore hold that the defendant, in the instant case, may not claim the privilege against self-incrimination."

Petitioner's reliance on Louisiana v. Eros Cinema, Inc., 264 So. 2d 615, is misplaced. (Petition, p. 11) In the Eros Cinema case the New Orleans police had used affidavits and an ex parte search warrant to pick up three films. The Louisiana trial court ruled contrary to the Ohio trial court and suppressed the evidence for failure to provide an adversary hearing prior to the seizure of the search warrant. In reversing the trial court ruling the Louisiana Supreme Court held that the films could be picked up under a search warrant which had been issued on the basis of police officer affidavits and an ex parte hearing. The statement of the Louisiana Supreme Court, cited by Petitioner, was a statement of the General Rule, was dictum, and was made to reinforce its main ruling that an adversary hearing was not needed in the case under review. The Louisiana Supreme Court was not consider-

ing the issue which was injected into this case through federal interference (see footnote at page 5) and did not focus upon the specific factual situation and the narrow "waiver" issue herein presented where (1) the foundation for the production of real evidence by Petitioner is presented by evidence aliunde, and (2) the Petitioner was not called upon to "testify" but was only called upon to produce the real evidence, and (3) where the facts demonstrate that, at the time of service of process, Petitioner (a) was in possession of the real evidence (the film), and (b) was in the process of showing the same to the public as part of a commercial venture, and (c) continued thereafter in his claim of a First Amendment right to show the same, in the face of a judicial challenge alleging damage to public morals.

Similarly, the Pennsylvania Supreme Court in Commonwealth of Pennsylvania v. Polak, 263 A. 2d 354, was not considering the narrow factual situation herein presented and the specific issue of waiver.

The brief remarks of Associate Justice Elkington of the Court of Appeal, First District, Division One, in People of the State of California v. DeRenzy, 79 Cal. Rptr. 777, 779 (Sept. 24, 1969) that:

> "Any court process designed to compel production of the questioned material would obviously impinge upon the possessor's Fifth Amendment rights. (See Boyd v. U. S., 116 U. S. 616, 634-635, 6 S. Ct. 524, 29 L. Ed. 746)."

was again merely abroad general statement of the law which, as in Louisiana v. Eros Cinema, Inc., supra, was made as justification in support of the Court's main holding that an adversary hearing was not necessary and that a seizure under a search warrant could be made on affidavits presented at an ex parte hearing. The California Court did not consider the specific factual situation and the narrow "waiver" issue herein presented where (1) the foundation for the production of real evidence by Petitioner is presented by evidence aliunde, and (2) the Petitioner was not called upon to "testify" but was only called upon to produce the real evidence, and (3) where the facts demonstrate that, at the time of service of process, Petitioner (a) was in possession of the real evidence (the film), and (b) was in the process of showing the same to the public, and (c) continued thereafter in his claim of a First Amendment right to show the same.

CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Ohio should be affirmed. Alternatively, the writ should be granted and the case set for briefing and oral argument on "Question 5" presented at page 5 of this Brief in Opposition, together with argument on the Petition for Writ of Certiorari of Fair and Huffman to be filed in Smith v. Fair and Huffman, ___ F. 2d __ (Apr. 17, 1974) (as stated on page 6 at footnote 2).

DATED: May 13, 1974

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of May, 1974, copies of the within Brief in Opposition were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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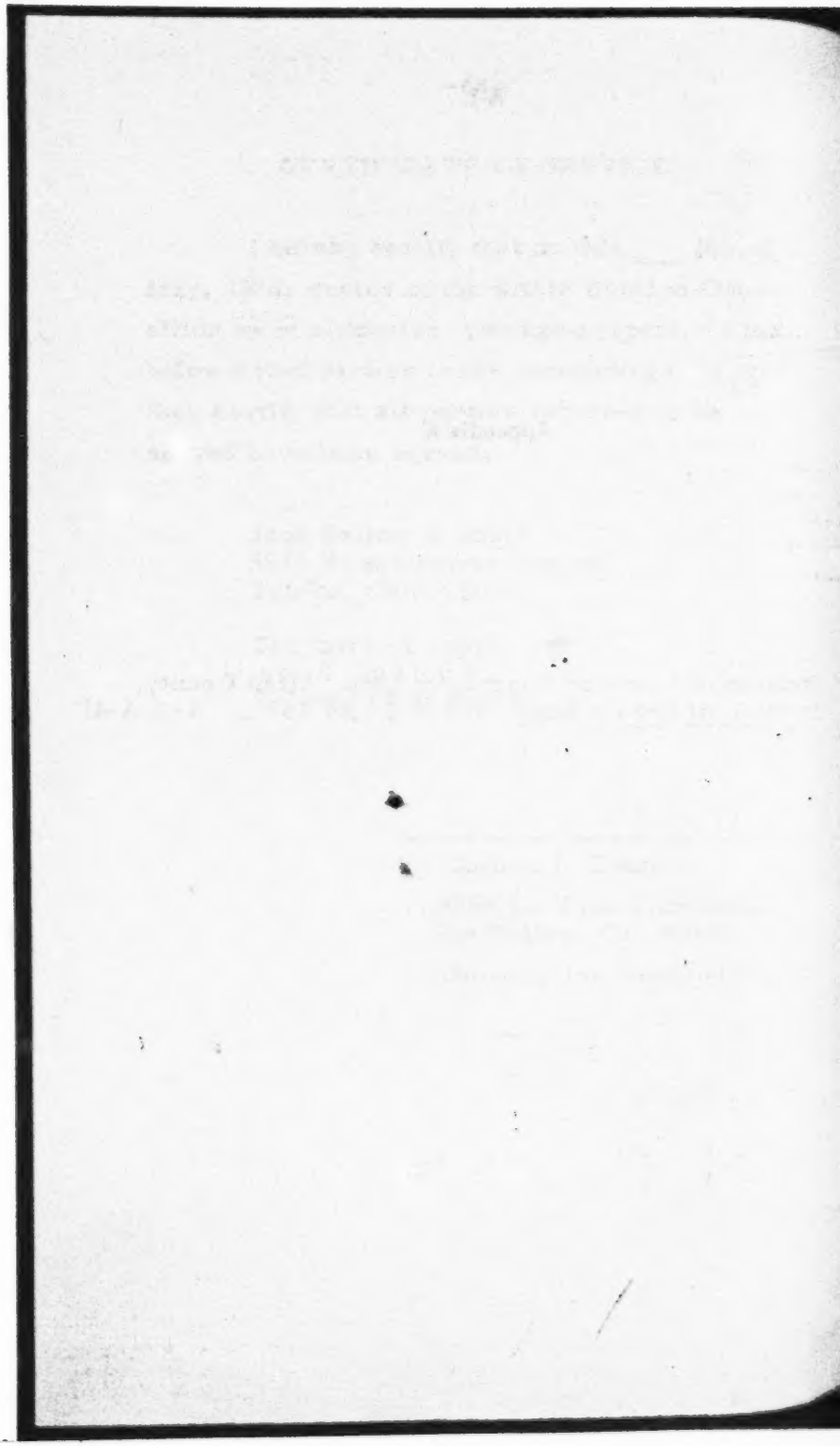
Appendix A

Opinion of Court of Appeals of Ohio, Allen County, in State of Ohio v Boyd 300 N.E. 2d 752 ...A-3, A-11



35 Ohio App.2d 147

The STATE of Ohio, Appellee,

v.

BOYD, Appellant.

No. 1450.

Court of Appeals of Ohio, Allen County.

Dec. 18, 1972.

Defendant was charged with possession of an obscene motion picture film for purpose of exhibition and was convicted in the Court of Common Pleas, Allen County, and sentenced. Defendant appealed. The Court of Appeals first dismissed the appeal but after remand, 30 Ohio St.2d 64, 282 N.E.2d 366, the Court of Appeals, Guernsey, P. J., held that a search warrant was valid, that the First Amendment was not violated by seizure of a single copy of the film for the sole purpose of use as evidence and that the indictment was sufficient. The Court also held that where an obscene film trailer, for the purpose of advertising a coming attraction, was exhibited without warning to an entire theatre audience, such publication was in a manner so obtrusive as to make it impossible for unwilling individuals in the audience to avoid exposure to the film and it was not constitutionally protected.

Affirmed.

Appeal to Supreme Court dismissed April 6, 1973.

1. Constitutional Law ⇐90.1(6)

First Amendment was not violated by seizure of single copy, pursuant to search warrant, of obscene film for sole purpose of using it as evidence in criminal prosecution, though no adversary hearing was held before seizure. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 568; U.S.C.A.Const. Amends. 1, 14.

2. Judgment ⇐829(1)

Neither decision of federal district court that seizure of motion picture film had been illegal for want of prior adversary hearing on obscenity nor return of film pursuant to district court's order precluded subsequent issuance of valid subpoena duces tecum for production of film for use as evidence in obscenity prosecution, where state Court of Appeals decided, consistent with United States Supreme Court decisions, that seizure had been valid. R. C. § 2905.34 and § 2903.11, 130 Ohio Laws p. 568; U.S.C.A.Const. Amends. 1, 14.

3. Searches and Seizures ⇐3.6(3)

Affidavit was not insufficient to authorize warrant for seizure of obscene film merely because affiant himself had not viewed the film, where informant who had viewed film was constable whom magistrate as well as affiant could conclude would be credible in his observations and informing. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 568; U.S.C.A.Const. Amends. 1, 14.

4. Indictment and Information ⇐110(19)

Obscenity indictment which in each count followed statutory language and included language charging guilty intent as required by judicial decision and which, in view of language actually used, made reasonably certain that grand jury found that film was obscene was sufficient without grand jury's finding or charging separate elements of obscenity. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 568; R.C. § 2943.06.

5. Obscenity ⇐12

In view of statute requiring jury trial of issue of former jeopardy and allowing introduction of "other evidence" to establish identity of the offense, indictment sufficiently identified movie trailer alleged to be obscene, though it did not name film by its title. R.C. § 2905.34 and § 2903.11, 130

6. Constitutional Law ⇐90.1(6), 274.1(3)

Whether material constitutes hard-core pornography or not, its distribution or exhibition is protected by First and Fourteenth Amendments unless (1) statute in question in its application to offense charged reflects specific and limited state concern for juveniles or (2) there is suggestion of assault upon individual privacy by publication in manner so obtrusive as to make it impossible for unwilling individual to avoid exposure to it, or (3) there is evidence of "pandering." R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658; U.S.C.A. Const. Amends. 1, 14.

7. Obscenity ⇐5

Statute amended as part of act "relative to the dissemination of obscene matter to minors" reflects specific and limited state concern for juveniles within judicial exceptions to constitutional protection of pornographic material. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658; U.S.C.A.Const. Amends. 1, 14.

8. Obscenity ⇐5

Where obscene film trailer, for purpose of advertising coming attraction, was exhibited without warning to entire theatre audience, publication was in manner so obtrusive as to make it impossible for unwilling individuals in audience to avoid exposure to the film and it was not constitutionally protected. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658; U.S.C.A. Const. Amends. 1, 14.

9. Criminal Law ⇐470, 478(1)

Trial court in obscenity prosecution did not abuse discretion in permitting television station director to give opinion as expert on behalf of State on issue of obscenity of movie film. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658.

10. Criminal Law ⇐494

Film trailer was evidence, in and of itself, of its obscenity, that together with exhibition that film was obscene. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658.

11. Obscenity ⇐17

Evidence which was fully sufficient to show that defendant in obscenity prosecution had knowledge of content and character of film from which it could be inferred that he knew it was obscene as matter of fact was sufficient to establish his knowledge of obscenity; it was not required that he would be able to conclude that film was obscene as matter of law. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658.

12. Obscenity ⇐17

Although evidence adduced in obscenity prosecution would have supported inference that film produced in evidence was same as that which was subject matter of charges, it was sufficient that film produced in evidence show identically same things which were shown by film which was subject matter of the charges and thus tended to be proof of its content. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658.

13. Obscenity ⇐17

In obscenity prosecution, if there is other evidence to prove elements of the crimes, it is conceivable that charges could be proved without production of any film, subject only to best evidence rule, which is based primarily on matter of availability. R.C. § 2905.34 and § 2903.11, 130 Ohio Laws, p. 658.

Syllabus by the Court

1. Where incident to a search made pursuant to a lawful search warrant an alleged obscene film has been seized without a prior adversary hearing having been held on the question of its obscenity and thereafter returned to its custodian the lack of such prior adversary hearing does not nullify a subpoena duces tecum thereafter issued for its production at the trial of its custodian or prohibit its introduction

2. An indictment in the words of the ohibitory statute which alleges the ob-enity of a film without naming it by its le and without setting forth the separate ements of obscenity does not prevent the fendant from successfully asserting a a of double jeopardy and does not, by ason of such alleged deficiency, require e sustaining of a motion to quash.

3. Whether the material involved nstitutes hard core pornography, or not, e distribution or exhibition of books, otographs and films is protected by the irst and Fourteenth Amendments to the onstitution of the United States, as deter-ined by the Supreme Court of the United tates in Redrup v. State of New York, 6 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515, nless (1) the statute in question in its ap-ication to the offense charged reflects a pecific and limited state concern for juve-iles or (2) there is suggestion of an assault pon individual privacy by publication in a anner so obtrusive as to make it impossi-le for an unwilling individual to avoid ex-osure to it, or (3) there is evidence of the ort of "pandering" which the Supreme ourt found significant in Ginzburg v. Unit-d States, 383 U.S. 463, 86 S.Ct. 942, 16 L. d2d 31. A book, photograph or film nsidered obscene under the Ohio test set rth in State v. Mazes, 7 Ohio St.2d 136, 8 N.E.2d 725, could be constitutionally rotected if the offense charged does not nvolve one or more of the exceptions set rth in *Redrup*.

4. R.C. 2903.11, directed specifically nd solely to prohibiting dissemination of bscene matter to minors, reflects a specif-c and limited state concern for juveniles nder the *Redrup* exceptions.

5. An obscene film shown to an en-re theater audience without warning as rt of the advertising of coming attrac-ons constitutes a publication in a manner bstrusive as to make it impossible for willing individual to avoid exposure

6. A trial court does not clearly abuse its discretion in admitting on the question of the obscenity of a film the opinion testimony of a program director of a television station who, as such, was fully familiar with the film fare offered to the public by television stations both locally and nationwide and fully familiar with its acceptability to the public.

7. Independently of expert testimony a film may, in and of itself, constitute evidence of its obscenity.

8. Knowledge of the defendant of the obscene character of a film may be inferred from the knowledge of the defendant that the film is obscene as a matter of fact, and there is no requirement that he be able to arrive at a conclusion that the same was obscene as a matter of law.

9. In order to prove possession of an obscene film there is no absolute requirement in law that the particular film possessed be produced in court to prove the commission of the crime. If there is other evidence to prove the elements of the crime it is conceivable that the charges could be proved without the production of any film, subject only to the best evidence rule.

Ted Iorio, Toledo, for appellant.

Lawrence S. Huffman, Pros. Atty., for appellee.

GUERNSEY, Presiding Judge.

This is an appeal by defendant, Robert Boyd, from a judgment of the Common Pleas Court of Allen County, Ohio, convicting and sentencing him for a violation of R.C. 2903.11 (130 Ohio Laws 658), in that on September 13, 1969, he "did unlawfully and knowingly have in his possession for the purpose of exhibition to a minor under the age of eighteen years, a motion picture film which is obscene, indecent,

morals of such youth," and for a violation of R.C. 2905.34 (131 Ohio Laws 673), in that on September 17, 1969, he "did unlawfully, and knowingly have in his possession and under his control an obscene, lewd and lascivious motion picture film for the purpose of exhibition and dissemination of said obscene, lewd and lascivious motion picture film."

It appears undisputed in evidence, among other things, that Boyd was, on both dates, the manager of an outdoor movie theater located near Lima, Ohio; that on the earlier date he caused to be exhibited in the time interval between the showing of two feature films, and together with other associated advertising material advertising coming attractions a film trailer of approximately ten minutes duration advertising the movie "Starlet"; that the trailer depicted, or graphically suggested, the happening of a variety of sexual acts occurring between both those of the opposite and of the same sex and was accompanied by a matching sound track replete with double entendre aiding in the suggestion of what one might conclude the acts depicted as portraying; that neither in the newspaper advertising of the theater, nor on the premises thereof was any mention made that anything of such nature was to be shown that evening or that the audience should be in any manner restricted; that no other forewarning was given of the showing of the trailer; that in one car and seeing the trailer shown were three boys of less than eleven, nine and seven years of age, respectively, in another car and seeing the trailer shown was a boy of eleven years of age, and in the theater were many other young children as well as adults; that on September 17, 1969, Boyd was met on the steps of the projection booth of the theater by a deputy sheriff, was handed a search warrant for the trailer, which Boyd then got from the floor of the projection booth, instructed the projectionist to remove advertising clips from it, which was then done, and the film trailer was then taken into the possession of the deputy sheriff; that the film trailer was subsequently returned to Boyd pursuant to order of a federal district court and concurrently with its return a subpoena duces tecum was served on Boyd to produce the film at the trial of the charges against him.

In his appeal Boyd makes five assignments of error which we will consider in the chronology of the trial.

[1,2] *Assignment of Error No. I.* "The trial court erred in permitting the introduction into evidence of the motion picture trailer 'Starlet' because it was seized without a prior adversary hearing having first been held and pursuant to an invalid search warrant."

Assignment of Error No. III. "The trial court erred in overruling appellant's motion to quash a subpoena duces tecum requiring him to bring into court the motion picture trailer 'Starlet' which was then admitted into evidence."

We consider these two assignments of error together because they involve, in their essentials, much of the same matter, the argument being that the trailer was illegally seized, properly returned by the federal court, and once ordered returned could not be ordered produced pursuant to a subpoena duces tecum. To dispose of these contentions we need only assume, without deciding, that the defendant is right in his contention that evidence ordered returned because illegally seized may not be ordered produced pursuant to a subpoena. However, it does not follow that evidence which has been legally seized and then returned may not be ordered produced pursuant to such subpoena.

We have examined the decisions of the United States Supreme Court carefully with particular emphasis on its decisions in the cases of Marcus v. Search Warrant (1961), 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; A Quantity of Books v. Kansas (1964), 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; and Freedman v. Maryland (1965), 380 U.S. 51, 85 S.Ct. 734,

...69), and notwithstanding that these cas... set forth limitations on seizure *as con*...*dence* and for destruction we find no de... which would indicate that one copy ... film alleged to be obscene may not be ...ed without a prior adversary hearing to ...ed *as evidence* in a prosecution for its ...ession. The Supreme Court of Ohio ...s recognized this distinction in State v. ...ini (1972), 31 Ohio St.2d 27, 285 N.E. ...327, where it held:

"Where, incident to a lawful arrest upon ...harge of exhibiting an obscene motion ...ture film, a single copy of the film is ...ed as evidence to be used in support of ...e charge, the fact that, prior to its sei...re, no adversary hearing had been held ...on the question of the obscenity of the ...n does not require reversal of a convic...n for its unlawful exhibition."

We find this case decisive of the issue ... prior adversary hearing, and as it is ...nsistent with the holdings of the United ...ates Supreme Court we are not in the ...sition of following a decision of the ...io Supreme Court in the face of a dif...ent decision on the same issue by the ...ited States Supreme Court.

[3] Defendant further contends, how...r, that the search warrant was insuffi...t because the affiant "did not see per...ally the trailer 'Starlet' before its 'con...ation' and relied on the hearsay infor...ion received from two informants." ...mittedly the affiant who obtained the ...rch warrant was not prior to executing ... affidavit a witness to the showing of ... film trailer in question and his affida... contained the following with respect to ...informants:

"Affiant further avers the facts upon ...ch such belief [the concealment of the ...ese movie trailer] is based are: infor...ion received from E. L. Stringfield, ... Allentown Road, Lima, Ohio, that he ...ewed an exhibition of a motion pic... trailer on September 13, 1969 and nude woman with the private parts of her body exposed; that said film depicted a nude couple engaged in sexual relations and that said film showed a nude female committing an act of oral sodomy upon a nude male.

"Affiant further says that the facts on which belief is based, is information received from Paul Jackson, Bath Township Constable; that he has viewed exhibitions of said motion picture film trailer of the moving picture 'Starlet' on several occasions prior to September 13, 1969; that said motion picture film trailer is in color; that its exhibition lasts approximately seven (7) minutes on the screen; that it depicts a nude male and female engaged in the act of sexual intercourse; that it depicts an act of oral sodomy performed by the nude female and that the nude female appears with her pubic area and other private parts of her body fully exposed; that said motion picture film trailer is contained in a metal container designed for the purpose of storing said film and was seen by the said Paul Jackson in the projection room of the Springbrook Drive-In Theater on or about September 13, 1969."

State v. Joseph, 25 Ohio St.2d 95, 267 N.E.2d 125, sets forth the criteria for the sufficiency of Ohio search warrants as tested against federal constitutional standards regarding probable cause prescribed by the United States Supreme Court. The Ohio Supreme Court concluded that the test which we are bound to apply is set forth in Aguilar v. Texas (1964), 378 U.S. 108, 114–115, 84 S.Ct. 1509, 1514, 12 L.Ed. 2d 723:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were

of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887, was 'credible' or his information 'reliable.' * * *"

Although there is nothing in the paragraph in the affidavit referring to informant Stringfield to identify the film trailer by name or to show where he had viewed its exhibition, the paragraph in the affidavit relating to informant Jackson not only shows the character and identity of the film trailer and where it had been seen and kept, but identifies Jackson as a "Bath Township Constable", a person whom the magistrate as well as the affiant could conclude would be credible in the observations which were related as being made by him and whose information in such respect would be reliable. The affidavit meeting the standards set forth in *Aguilar* we need not be, and are not, concerned with the defendant's claim that the affiant did not personally see an exhibition of the film trailer before seizing it.

Concluding that the search warrant affidavit was sufficient and that no prior adversary hearing as to the obscene character of the film trailer was necessary we also conclude that the defendant has not shown any illegality in the search and seizure. That being the case, it follows that the required production of the film by virtue of a subpoena duces tecum was not in any manner violative of defendant's rights.

Assignment of Error No. V. "The trial court erred in overruling appellant's motion to quash the indictment since the indictment does not afford a record whereby the appellant could successfully assert a plea of double jeopardy."

This assignment refers to a claimed absence from the indictment of a grand jury finding of obscenity, or of any of the elements constituting obscenity, and an absence therefrom of any name or identification of the motion picture film involved.

[4] Each of the counts of the indictment following the language of the statute and the second count thereof relating to possession (R.C. 2905.34) is further qualified by the language indicated by the requirements set forth in State v. Ross, 12 Ohio St.2d 37, 231 N.E.2d 299. It is the general rule that an indictment in the language of the statute creating and defining the offense on which the prosecution is based is sufficient. In view of the language actually used in the indictment it cannot be reasonably contended that the grand jury failed to find that the film involved was obscene. Finding the whole, it was not necessary for it then to find the separate elements of obscenity.

[5] The claim that the form of the indictment would deprive the defendant of a future plea of double jeopardy has no validity for under the provisions of R.C. 2943.06, the issue of former jeopardy "shall be tried to a jury, and on such trial the defendant must produce the record of such conviction, acquittal, or jeopardy, and prove that he is the person charged in such record, and *he may also introduce other evidence to establish the identity of such offense.*" (Emphasis added.) This statute adequately protects the defendant against the problem which he envisages arising from the failure of the indictment to more fully identify the movie trailer.

Assignment of Error No. I. "The court erred in finding the motion picture trailer 'Starlet' obscene."

Under this assignment the defendant claims that the scenes shown in the subject film trailer are indistinguishable from the types of photography found to be protected by numerous decisions of the United States Supreme Court. When one considers the descriptions of the textual matter in books of scenes depicted in photographs, and of the content of films, involved in cases where the Supreme Court of the United States has reversed obscenity convictions obtained in state courts it is difficult to know what is and what is not ob-

the view of the Supreme Court of the United States.

Although in September, 1969, the time of the occurrences from which arose the matters for which the defendant stands charged, there was no statutory definition of obscenity existing in Ohio, the Ohio Supreme Court had, nevertheless, arrived in the case of State v. Mazes, 7 Ohio St.2d 136, 218 N.E.2d 725, at its own definition based on the definition set forth and agreed to by a minority of the United States Supreme Court in the case of A Book v. Attorney General of Massachusetts (1966), 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1, at least with application to the obscenity of books. That definition arrived at by the Ohio Supreme Court was:

"In order that a publication may be held to be in violation of Section 2905.34 of the Revised Code, "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

[6] It must be recognized, however, that in the federal constitutional area involving the freedoms of speech and freedom of the press any definition of obscenity by a state court must yield to the decisions of the Supreme Court of the United States relating to such constitutional rights. But neither in A Book v. Attorney General of Massachusetts, *supra*, nor in any other case has a majority of the Supreme Court settled upon one definition of obscenity. See Requiem for Roth, 69 Mich.L.Rev. 185, and Sensenbrenner v. Adult Bookstore, 26 Ohio App.2d 183, 189, 271 N.E.2d 13. It must be concluded from the consistent and controlling application by the court of the case of Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515, that the decision under the First and Fourteenth Amendments to the Constitution of the United States of books, photographs, and films at least as offensive as the film herein involved, that whether the material constitutes hard core pornography, or not, the distribution or exhibition of same is protected by these amendments unless (1) the statute in question in its application to the offense charged reflects a specific and limited state concern for juveniles or (2) there is suggestion of an assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it, or (3) there is evidence of the sort of "pandering" which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31. Thus, although a book, photograph or film might be considered obscene under the definition set forth in State v. Mazes, *supra*, it could be still constitutionally protected if the offense charged did not involve one or more of the exceptions set forth in the *Redrup* case.

Having viewed the film trailer, "Starlet" and reviewed the rest of the record, we are of the opinion that there was sufficient evidence of probative value to prove the film obscene under the three prong test set forth in State v. Mazes, *supra*, and alluded to in Redrup v. State of New York, *supra*. The record will not support a conclusion by this court, as a matter of law, that the film trailer was not obscene, as so defined. The film being obscene, are the offenses charged then within any of the exceptions to the operation of the *Redrup* case?

[7] R.C. 2903.11, the statute under which the first count of the indictment was founded was amended as part of an act "relative to the dissemination of obscene matter to minors" (130 Ohio Laws 658, Amended Senate Bill No. 115) and is directed specifically and solely to prohibiting such dissemination. It therefore reflects a specific and limited state concern for juve-

[8] The offenses under both counts of the indictment occurred by the exhibition of the film trailer without warning to the entire theater audience at a time and under circumstances when it could be expected that they would be looking; indeed, under circumstances, the advertising of a coming attraction, where the defendant wanted them to be looking. The audience not being forewarned of what was going to be shown the publication of the film was in a manner so obtrusive as to make it impossible for any unwilling individual in the audience to avoid exposure to the film.

In Ginzburg v. United States, 383 U.S. 463, 467, 86 S.Ct. 942, 945, 16 L.Ed.2d 31, the Supreme Court defines pandering in terms set forth in Roth v. United States, 354 U.S. 476, 495, 496, 77 S.Ct. 1304, 1 L.Ed.2d 1498, 1315, as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." That case involved the question of the obscenity of a hardcover magazine, a bi-weekly newsletter and a short book and convictions for the violation of the federal obscenity statute were upheld in view of the defendant's pandering in their production and sale. Here, the question is not whether the full length movie "Starlet" was obscene because of the presence of pandering but merely whether the advertising therefor, the film trailer "Starlet", was obscene. Although the trailer may have constituted pandering for the movie, the element of pandering was not present as to the trailer.

We conclude that the prohibited conduct, as to each count of the indictment, came within at least one of the categories set forth in the *Redrup* case excepting the film from the constitutional protections recognized by that case. The trial court did not err, therefore, in finding the motion picture trailer "Starlet" (legally) obscene. Compare, State ex rel. Keating v. Vixen, 27 Ohio St.2d 278, 272 N.E.2d 137.

Assignment of Error No. IV. "The record is totally devoid of any evidence showing: (1) The obscenity of the motion picture trailer 'Starlet.' (2) That the defendant knew the film was obscene. (3) That the film introduced into evidence is the same film seized on September 17, 1969."

[9] Under the first portion of this assignment the defendant claims that the television station program director offered by the State as an expert witness with respect to establishing community standards was not qualified as an expert. It is difficult for this court to conceive of how one becomes an expert on obscenity. Must he be an obscene person, must he be a person who has no tolerance for obscenity, or must he fall in the middle ground between these extremes? What educational or experience requirements are applicable? The determination of the qualifications of an expert witness is a matter for the trier of facts and rulings with respect thereto will ordinarily not be reversed unless there is a clear showing that the court abused its discretion. Cities of Canton, etc. v. Public Utilities Commission, 385 U.S. 828, 87 S.Ct. 62, 17 L.Ed.2d 64, and In re Ohio Turnpike Commission, 164 Ohio St. 377, 131 N.E.2d 397. The proffered expert was, as a program director, fully familiar with the film fare offered to the public by television stations both locally and nationwide and fully familiar with its acceptability to the public. We are of the opinion that the defendant has not shown a clear abuse of discretion by the trial court in admitting his opinion testimony.

[10] The assertion by the defendant that the record is totally devoid of any evidence showing obscenity is not only not well taken because such expert testimony was admissible but also because the subject film trailer was evidence, in and of itself, of its obscenity.

[11] As to the assertion that there is no evidence that the defendant knew the film was obscene, the evidence is fully sufficient to show that the defendant

knowledge of the content and character of the film from which it may be inferred that he knew that it was obscene as a matter of fact. There is no requirement that he be able to arrive at a conclusion that the same was obscene as a matter of law.

[12, 13] As to the identity of the film introduced into evidence it must be remembered, in the first place, that each of the counts with which the defendant was charged relates to the possession of an obscene film. There is no requirement in law that the particular film possessed must be produced in court to prove the commission of the crimes. Indeed if there is other evidence to prove the elements of the crimes it is conceivable that the charges could be proved without the production of any film, subject only to the best evidence rule which is based primarily on the matter of availability. Although the evidence adduced would have supported an inference that the film produced in evidence was the same film as that which was the subject matter of the charges, the important thing here is not such identity but that the film produced in evidence shows identically the same things that were shown by the film which was the subject matter of the charges and thus tends to be proof, in this case conclusive, of its content. The record was replete with evidence of such identity and defendant's claim is without merit.

Having found no error prejudicial to the defendant in any of the particulars assigned and argued the judgment of the trial court must be affirmed.

Judgment affirmed.

YOUNGER, P. J., and COLE, J., concur.

Appendix B

U. S. District Judge Don J. Young's letter of October 22, 1970 re Boyd v Huffman C70-296 and the consequences of a federal order requiring the prosecutor to return the film. B-3, B-4

Opinion of U. S. District Judge Don J. Young in Boyd v Huffman C70-296, dated December 22, 1970, denying a contempt citation in connection with the prosecutor's service of a subpoena duces tecum upon Boyd at the time the film was returned under the Federal Court order B-5, B-6

United States District Court
Northern District of Ohio
Judge's Chambers
211 U.S. Court House & Custom House
Toledo, Ohio 43624

Don J. Young
District Judge

October 22, 1970

wrence S. Huffman, Esq.
O. Box 546
ma, Ohio 45802

Re: C 70-296 Boyd v. Huffman, et al.

ar Mr. Huffman:

I have your letter of October 21st with the enclosed emorandum opposing defendant's motion to suppress which you ed in the Allen County Court of Common Pleas. I have read very scholarly memorandum with great interest; however, you ll recall that a three judge court was empaneled and decided e questions presented in the Boyd case some time ago. There s no appeal from the decision of that court by any of the par- s defendant, although they had the right to take a direct ap- al to the Supreme Court of the United States. Regardless, erefore, of what other courts may do, until some court superior me has rendered a decision which will make the decision in three judge court case erroneous, I feel myself impelled to llow it and expect to continue to do so.

I do not agree with the statement in the last para- aph of your letter that "Of course, it is our position that we are required to return the evidence at this time, that as ractical matter, we have no way to regain it in the event the ues are ultimately resolved unfavorably to the plaintiff ". It would appear to me that in the criminal prosecution the plaintiff in this case, the state should be able to issue ubpoena duces tecum to compel the production of the film, ich will undoubtedly be in the possession of one or more dis- utors located within the State of Ohio if not in the pos- sion of the plaintiff himself.

In any event, as a judge of the lowest rank of federal rts, I am required to follow the decisions of the Circuit Court my Circuit and of the Supreme Court of the United States. De- s by state courts of any rank, federal circuit courts of

other circuits, and other federal district courts, are not precedents which are binding upon me, however persuasive may be in their logic or reasoning.

Even if I accepted your argument that the Supreme Court decisions are not, in fact, entitled to be regarded as legal precedents, however, I would still feel myself bound by a decision which I had formerly made and which has not been reversed by any higher court until some decision which I was bound to honor clearly and precisely showed that it was erroneous. That being the case, I hope that until you can put me in that position that requires me to abandon my former holding, you will honor it and not require me to reiterate it repeatedly in cases to which you are a party.

Very respectfully yours,

Don J. Young,
United States District Judge

DJY:sr

cc: Jack Gallon, Esq.
435 South Hawley
Toledo, Ohio.

B-5

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CLERK, U.S. DISTRICT COURT
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Robert Boyd,

Plaintiff,

vs.

Lawrence Huffman, et al.,

Defendants.

No. C 70-296

OPINION

YOUNG, J:

This cause came to be heard on the motion of plaintiff for an order requiring the defendant, Lawrence Huffman, to show cause why he should not be adjudged in contempt of this Court in regard to the final judgment rendered by it on November 2, 1970.

Plaintiff alleges that on that date this Court ruled that the film entitled "Starlet" would be inadmissible for use in any state proceeding. Plaintiff is totally mistaken. The order of this Court provided:

> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants, their agents, servants, attorneys, representatives, and successors in office are hereby enjoined until further order of the Court:
>
> 1. From seizing or otherwise obstructing the showing of any films or motion pictures by the plaintiff at the Springbrook Drive-In Theatre in Allen County, Ohio, without first subjecting said film or motion picture to a prior adversary hearing
>
> 2. From threatening to seize or otherwise interfere with the showing of any film or motion picture without first having a prior adversary hearing before the proper judicial authority. Defendants, their agents, servants, attorneys, representatives, and successors in office are also directed and ordered to immediately return to the plaintiff the film 'Starlet' which was seized by defendants, on or about September 17, 1969.

The defendant complied with this order by returning the film to the plaintiff on October 23, 1970. On that same date the plaintiff was served with a criminal subpoena duces tecum requiring him to bring with

him the film entitled "Starlet" to the Allen County Court of Common Pleas on December 9, 1970, at 9:00 a.m. The Court finds no impropriety in the defendants' use of the subpoena. The subpoena duces tecum was employed, as opposed to a seizure, to assure the production of the film at the criminal proceedings in a manner which would not be in contravention of prescribed constitutional mandates.

The result reached herein is entirely consistent with the reasoning of Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 661 (E.D. La. 1969), which this Court quoted with approval in Goodwin v. Morris, C 70-19 (N.D. Ohio, filed March 20, 1970). There the court stated:

> We are mindful of the fact that even attempts to regulate obscenity incorporating procedures for affording the required adversary hearing would themselves constitute prior restraints. . . . We can readily conceive, therefore, that much litigation would be spawned by the adoption of adversary hearing procedures. Nonetheless, it is apparent that there must be some permissible prior restraint, be it however subtle, if obscenity is not protected by the First Amendment and State attempts to regulate it are to be enforceable. It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulations. 304 F.Supp. at 667.

Other courts, relying upon the decision in Delta Book, supra, have viewed the use of a subpoena duces tecum as a constitutionally sanctioned method of ordering an allegedly obscene film into court, either for a prior adversary hearing or for the actual criminal trial. See e.g., Bathview Amusement Corp. v. Cahn, 416 F.2d 410, 412 (2nd Cir. 1969); Carroll v. City of Orlando, 311 F.Supp. 967, 969 (M.D. Fla. 1970).

It appearing to the Court that the plaintiff is not entitled to the relief requested, the motion will be denied and an order will be entered accordingly.

United States District Judge

Toledo, Ohio.